

No. 88-127-CSX
Status: GRANTED

Title: Norfolk & Western Railway Company, Petitioner
v.
Robert T. Goode, Jr.

Docketed:
July 21, 1988

Court: Supreme Court of Virginia

Counsel for petitioner: Oast Jr., Edward L.

Vide:
87-1979

Counsel for respondent: Tavss, Richard J., Wilcox, Bruce A.

See also:
87-1979

| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|---|
| 1 | Jul 21 1988 | G | Petition for writ of certiorari filed. |
| 2 | Aug 18 1988 | | Brief of respondent Robert T. Goode, Jr. in opposition filed. |
| 3 | Aug 24 1988 | | DISTRIBUTED. September 26, 1988 |
| 4 | Oct 3 1988 | P | The Solicitor General is invited to file a brief in this case expressing the views of the United States. |
| 6 | Jan 9 1989 | | Brief amicus curiae of respondent United States filed. |
| 5 | Jan 11 1989 | | VIDED. |
| 7 | Feb 21 1989 | | REDISTRIBUTED. February 17, 1989 |
| | | | Petition GRANTED. The case is consolidated with 87-1979, and a total of one hour is allotted for oral argument. |
| | | | ***** |
| 9 | Mar 25 1989 | | Order extending time to file brief of petitioner on the merits until April 22, 1989. |
| 10 | Apr 21 1989 | G | Motion of Association of American Railroads, et al. for leave to file a brief as amici curiae filed. |
| 11 | Apr 21 1989 | | Brief amicus curiae of United States filed. |
| 12 | Apr 21 1989 | | Joint appendix filed. VIDED. |
| 13 | Apr 21 1989 | | Brief of petitioner Norfolk & Western Railway Co. filed. |
| 14 | May 1 1989 | | Motion of Association of American Railroads, et al. for leave to file a brief as amici curiae GRANTED. |
| 15 | May 5 1989 | G | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| 16 | May 11 1989 | | Record filed. |
| | | * | Certified copy of original record received. |
| 18 | May 19 1989 | | Brief of respondent Robert T. Goode, Jr. filed. |
| 17 | May 22 1989 | | Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| 19 | Jun 5 1989 | D | Motion of respondents for divided argument filed. |
| 20 | Jun 12 1989 | | Motion of respondents for divided argument DENIED. |
| 21 | Jun 23 1989 | | Reply brief of petitioners Chesapeake and Ohio Railway Co., et al. filed. VIDED. |
| 22 | Jul 12 1989 | | CIRCULATED. |
| 23 | Jul 20 1989 | | SET FOR ARGUMENT TUESDAY, OCTOBER 3, 1989. (3RD CASE) |
| 24 | Jul 21 1989 | G | Motion of the Solicitor General to permit Christine Desan Husson, Esq. to present oral argument pro hac vice filed. |
| 25 | Sep 25 1989 | | Motion of the Solicitor General to permit Christine |

No. 88-127-CSX

| Entry | Date | Note | Proceedings and Orders |
|-------|------|------|------------------------|
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26 Oct 3 1989

Desan Husson, Esq. to present oral argument pro hac vice
GRANTED.
ARGUED.

①
88-127

Docket No.

FILED

JUL 21, 1988

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

October Term, 1987

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

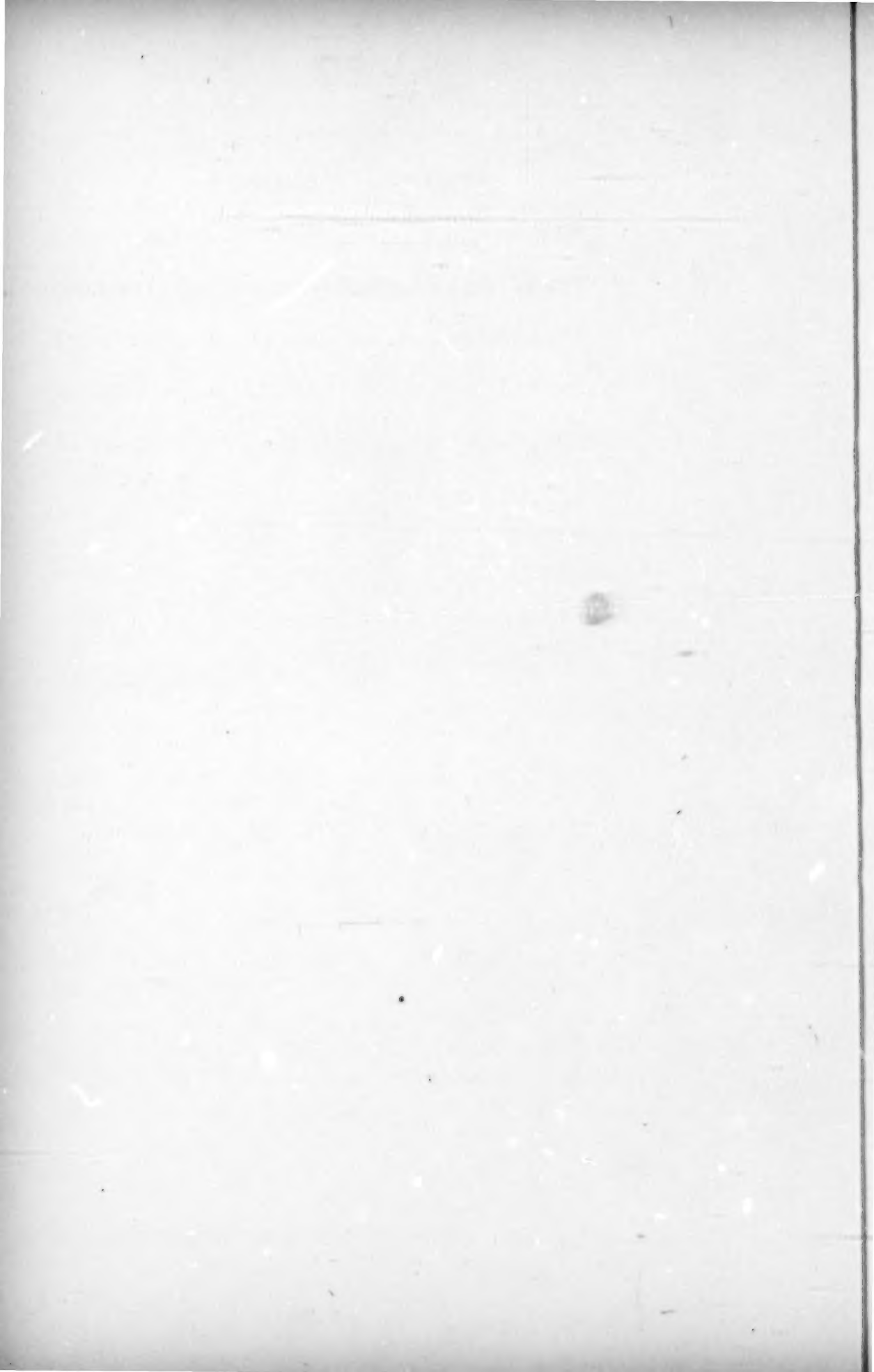
V.

ROBERT T. GOODE, JR.,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA**

Edward L. Oast, Jr.
John Y. Richardson, Jr.
Joan F. Martin
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AND GREER, P.C.
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Counsel for Petitioner



QUESTIONS PRESENTED

- I. Whether a pier machinist who repairs and maintains coal loading machinery at a maritime terminal fulfills the status requirement of the Longshore and Harbor Workers' Compensation Act?
- II. Whether a state court's adherence to a narrow definition of LHWCA status, despite uniform federal precedent to the contrary, effectuates the intent of Congress to create a simple uniform standard of coverage?

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STATE OF TEXAS

1911

THE STATE OF TEXAS, COUNTY OF DALLAS, ss.

I, the undersigned, Judge of the County of Dallas, do hereby certify that

the within and foregoing is a true and correct copy of the

original thereof as the same appears from the records of said County.

Witness my hand and the seal of said County at Dallas, Texas, this

day of _____, 1911.

Judge of the County of Dallas.

Subscribed and sworn to before me this _____ day of _____, 1911.

Notary Public for the State of Texas.

My commission expires this _____ day of _____, 1911.

I, _____, Clerk of the County of Dallas, do hereby certify that

the within and foregoing is a true and correct copy of the

original thereof as the same appears from the records of said County.

Witness my hand and the seal of said County at Dallas, Texas, this

day of _____, 1911.

Clerk of the County of Dallas.

Subscribed and sworn to before me this _____ day of _____, 1911.

Notary Public for the State of Texas.

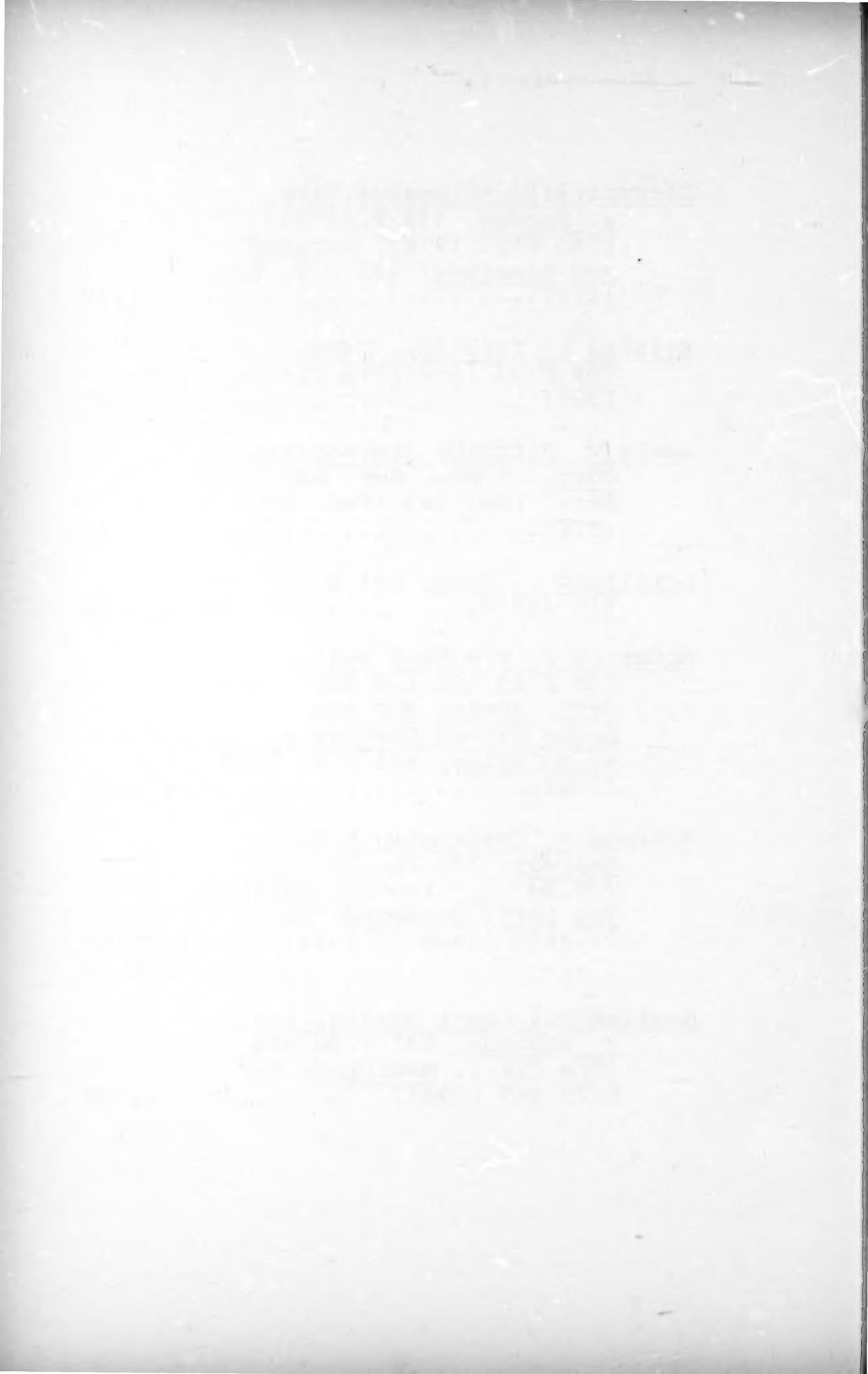
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UNITED STATES DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY
WASHINGTON, D. C.

REPORT OF THE
COMMISSIONER OF PLANT INDUSTRY
FOR THE YEAR 1901

BY
J. H. COOPER, CHIEF OF BUREAU

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. _____

NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner,

v.

ROBERT T. GOODE, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

Petitioner, Norfolk and Western
Railway Company,^{1/} respectfully prays
that a writ of certiorari be issued to

1/ Pursuant to Rule 28.1, Petitioner states
as follows: Norfolk and Western Railway Company
is a wholly owned subsidiary of Norfolk Southern
Corporation. Norfolk and Western Railway Com-
pany has the following subsidiaries (except
wholly owned subsidiaries) and affiliates:

Footnote continued on next page.

IN THE
SOUTHERN DISTRICT OF THE UNITED STATES

WESTERN TERM, 1921

AND

REPORT AND RECOMMENDATIONS OF THE

JUDGES

REPORT OF JUDGE, JR.

REPORT

REPORT OF THE JUDGE OF THE DISTRICT OF THE

UNITED STATES OF AMERICA

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review the judgment of the Supreme Court of Virginia.

OPINIONS BELOW

The April 22, 1988 decree of the Supreme Court of Virginia, unreported, is reprinted in the appendix at 17A-18A.

Footnote continued from previous page.

Wabash Railroad Company, The Wheeling and Lake Erie Railway Company, The Akron & Barberton Belt Railroad Company, The Belt Railway Company of Chicago, Chicago and Western Indiana Railroad Company, The Cleveland Union Terminals Company, Des Moines Union Railway Company, Ft. Wayne Union Railway Company, Green Real Estate Company, High Point, Thomasville & Denton Railroad Company, Iowa Transfer Railway Company, Kansas City Terminal Railway Company, Lafayette Union Railway Company, Peoria and Pekin Union Railway Company, Railbox Company, Railgon Company, Terminal Railroad Association of St. Louis, Trailer Train Company, Union Belt of Detroit, Winston-Salem Southbound Railway Company, Lamberts Point Barge Company, Inc., Norfolk and Portsmouth Belt Line Railroad Company, Norfolk Southern Marine Services, Inc., North American Van Lines, Inc., NS Fiber Optics, Inc., NS Transportation Brokerage Corporation, NW Equipment Corporation, Southern Railway Company, and Triple Crown Services, Inc.

The Court issued no separate opinion, relying instead on its March, 1988 opinion in the consolidated appeals of Schwalb v. Chesapeake & Ohio Railway and McGlone v. Chesapeake & Ohio Railway, 235 Va. 27, ____ S.E.2d ____ (1988),^{2/} in the appendix at 19A-36A. The letter opinion of the late Judge Waters, Circuit Court of the City of Norfolk, is reprinted at 1A-14A. The trial court judgment appears at 15A-16A.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

This case specifically requires interpretation of the Longshore and

2/ A petition for a writ of certiorari in these cases was filed in this Court on June 2, 1988 and has been docketed as No. 87-1979.

The Court is of the opinion that the
provisions of the Act are not
in violation of the Constitution.
The Court is of the opinion that
the provisions of the Act are not
in violation of the Constitution.
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the provisions of the Act are not
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REMARKS

The provisions of the Act are
not in violation of the Constitution.

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not in violation of the Constitution.

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not in violation of the Constitution.

Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 902(3) and 905(a). The text of these subsections appears at 71A-73A and 75A respectively. This case also involves the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-60, the relevant portion of which is reprinted at 77A.

STATEMENT OF THE CASE

Hampton Roads, Virginia is the largest natural harbor in the world. The harbor, which encompasses the port cities of Norfolk, Hampton and Newport News, is located where the Chesapeake Bay meets the Atlantic Ocean and is fed by the historic James, Nansemond and Elizabeth Rivers. Since 1607, when English colonists landed at Cape Henry and proceeded up the James River to settle at Jamestown, Hampton Roads has been

a hub of maritime commerce. Today vessels destined for or arriving from all major foreign and domestic ports are loaded and unloaded at numerous maritime terminals in Hampton Roads, where all types of cargo are transshipped by rail and trucking common carriers. The highway and railway systems serving the Hampton Roads terminals include tunnels and bridges which span the Chesapeake Bay, Hampton Roads harbor, the Elizabeth River and soon the James River. Hampton Roads alone accounts for more export tonnage than all of the other principal Atlantic Coast ports combined. In 1985, 49,340,000 short tons of cargo were loaded at Hampton Roads, as compared with 29,824,000 tons handled collectively by the ports of New York, Baltimore, Philadelphia, Charleston and

Boston.^{3/} Of this total, coal represents almost 90% of the export tonnage loaded onto outbound ships at Hampton Roads piers.^{4/}

In addition, the Hampton Roads area teems with commercial shipbuilding and ship repair facilities, as well as the world's greatest concentration of permanent naval installations. Norfolk Naval Shipyard, built in 1767 and home of the oldest drydock in the Western Hemisphere, has built some of the most famous ships in our naval history, including the first aircraft carrier. There are also numerous private shipbuilding and repair facilities located

3/ Source: Virginia Statistical Abstract, Table 21.3 (University of Virginia Center for Public Service, 1987 Ed.).

4/ Id., Table 21.19.

throughout the area. In short, Hampton Roads is perfused with an abundance of commercial maritime activities.

On the Elizabeth River in Norfolk, Virginia the petitioner, Norfolk and Western Railway Company, operates a coal loading terminal ("Lambert's Point"). Petitioner employs pier machinists, like respondent Goode, to repair and maintain machines and equipment at Lambert's Point that transfer coal from railroad cars to the holds of docked ships. This case involves the demarcation of "maritime employment" under the LHWCA to the exclusion of the FELA in the context of coal loading at Lambert's Point.

FACTUAL SUMMARY

Coal arrives at Lambert's Point from inland mines in railroad hopper cars, which are arranged by class in an

area called the "Barney Yard." Loading begins when the coal car is released from the Barney Yard to roll across the automatic scales toward the pier. A machine called a "Barney Mule" then propels the car toward the dumper, which is located at the land end of the pier. Positioned by a retarder^{5/} and embraced by the dumper's mechanical arms, the coal car is tipped upside down, allowing the cargo to fall onto conveyor belts leading to the loading tower, where the coal drops into the hold of the ship. Barring mechanical problems, the coal moves continuously from the automatic scales into the ship within a matter of

5/ The retarder is a mechanical device that stops the loaded coal car at the correct position on the dumper to permit the car to be held in place while being rotated 180°.

presented the same kind of
business when the work was in progress
the two parties saw to it that the
economic factors between the parties
were raised a further level than the
the fact that the work was in progress
located at the end of the line
positioned by a further level raised
of the project a technical level, the
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minutes by means of machines and gravity. Within 30 minutes after loading is completed, the vessel is expected to be away from the pier and on its journey.

Beginning in 1979, respondent was assigned to petitioner's Lambert's Point Motive Power-Piers department. His first duties included line tending, tying up ships at the pier, but by the time of his accident in 1985, respondent had been promoted to pier machinist. According to respondent's supervisors, pier machinists devote 98 to 99 percent of their work time repairing and maintaining the equipment directly involved in loading coal: the dumper, the shiploaders out on the pier, and the conveyor belt system between the two. On the day of his accident, respondent Goode was performing routine repairs on

the retarders attached to the Pier 6 dumper. The loading process was necessarily brought to a halt during the several hours respondent was repairing the retarder linkage. Respondent injured his hand as he was reattaching the air cylinder to the linkage on the dumper.

RAISING THE FEDERAL QUESTION

Goode brought an action in the Circuit Court for the City of Norfolk, seeking damages under the FELA. Petitioner moved to dismiss the FELA action for lack of jurisdiction, contending that the LHWCA provided plaintiff's sole and exclusive remedy. After an evidentiary hearing, the trial court sustained the railway company's motion and dismissed the FELA action. Acknowledging that the duty of lower state courts "is not to make law but to interpret and

follow the law as set forth by courts of higher dignity," the late Judge Waters found that respondent Goode was a maritime employee "involved in the essential elements of loading and unloading" as that phrase has been employed in numerous federal decisions applying the LHWCA status test. Judge Waters acknowledged the conflict between the Fourth Circuit Court of Appeals decision, Price v. Norfolk & Western Railway, 618 F.2d 1059 (4th Cir. 1980), and the earlier Virginia Supreme Court decision, White v. Norfolk & Western Railway, 217 Va. 832, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977). Expressing the belief that Goode would be found a maritime employee even under the narrower White analysis, Judge Waters nevertheless held that "this case does involve a federal

question, the federal authorities are therefore the more persuasive, and to the extent that White differs from significant federal decisions, the White court, in my opinion must yield." See Judge Waters' opinion at 10A.^{6/}

The sole issue considered by the Supreme Court of Virginia on appeal was whether Goode was a statutory employee as defined by the LHWCA. Persisting in its adherence to the narrow standard

6/ Newport News Circuit Court Judge Stephens, in Schwalb v. Chesapeake & Ohio Ry., No. 8827 (Aug. 8, 1984) and Portsmouth Circuit Court Chief Judge Schlitz, in McGlone v. Chesapeake & Ohio Ry., No. L84-327 (May 29, 1985) also chose to follow Price and the uniform federal authorities extending LHWCA coverage to pier employees, with Judge Schlitz noting that "White stands alone in contrast to the federal decisions . . . which have declined to follow White and have disagreed with its results." See Opinion of Judge Stephens, 61A-62A, and Opinion of Chief Judge Schlitz, 46A-47A. These rulings were also reversed by the Virginia Supreme Court on appeal. See infra note 2 and accompanying text.

established in its pre-Caputo White decision, the Supreme Court of Virginia reversed and annulled the judgment of the Norfolk Circuit Court and remanded the case for trial on the merits as an FELA claim. The court issued no explanatory opinion to support its decree, merely referring instead to its opinion issued the previous month in Schwalb v. Chesapeake & Ohio Railway, and McGlone v. Chesapeake & Ohio Railway, cited supra p. 3 and discussed in detail infra pp. 35-37.

ARGUMENT

Congress enacted the LHWCA in 1927 to provide federal compensation for injured employees working on navigable waters who were otherwise ineligible for state compensation awards. The disparities in coverage perpetuated by

the 1927 scheme along with the advent of containerized cargo loading technology prompted Congress to amend the Act in 1972. See Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 259-63 (1977). The 1972 Amendments broadened the scope of LHWCA coverage: by expanding the definition of the covered situs in 33 U.S.C. § 902(4), to include piers, terminals, and other areas customarily used for cargo loading; and by affirmatively describing the class of covered maritime employees, defined in 33 U.S.C. § 902(3), to include, for example, harbor workers and other persons "engaged in longshoring operations."^{7/}

7/ Further amendment in 1984 refined the
Footnote continued on next page.

This Court has prescribed judicial standards, consistent with the legislative intent of the 1972 amendments, for determining whether a terminal worker is engaged in maritime employment (the so-called "status" test) for purposes of the LHWCA. For more than a decade, the lower federal courts and the Benefits Review Board, the administrative body that oversees LHWCA claims, have contributed additional insightful analyses while applying the status test in a

Footnote continued from previous page.

"maritime employee" definition in response to some administrative and judicial uncertainty about the intended scope of the act. Congress, however, left undisturbed the 1972 coverage language applicable to this case. See infra p. 28 (discussing inference that legislative re-enactment implicitly adopts prior judicial and administrative interpretations). The 1984 version of § 902(3) appears at 71A; the prior version appears at 74A.

variety of factual settings. It is too late in the evolution of the LHWCA status test for the Supreme Court of Virginia to have misapprehended the principles approved by this Court. By denying LHWCA status to respondent Goode, a harbor worker engaged in an integral and essential part of the coal loading sequence, the Virginia Supreme Court has obviously repudiated controlling federal precedent. Such unsanctioned autonomy imperils the advancement of the single, uniform standard of coverage envisioned by Congress and warrants intervention by this Court.

I. Goode is a maritime employee

Determination of a worker's status as a maritime employee within the terms of the LHWCA is controlled by principles established in Northeast Marine Terminal

Co. v. Caputo, 432 U.S. 249 (1977). In Caputo, the Court found that Blundo, who monitored the stripping of cargo from unloaded containers, was engaged in maritime employment because his job was "an integral part of the unloading process." Id. at 271. By finding coverage for Blundo, who was performing essentially clerical duties at a shoreside loading facility, the Court emphasized that the critical question in determining LHWCA status is the purpose of the work, not the type of work. The Caputo Court also acknowledged that the expansiveness of the 1972 Amendments requires a corresponding expansive reading of the Act by the judiciary. Id. at 268. The Court reaffirmed this approach to the LHWCA status test in P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979). Again

focusing on the nature of a worker's general job responsibility and its relation to the shiploading process, the Pfeiffer Court ruled that two pier workers were maritime employees because they were "engaged in intermediate steps of moving cargo between ship and land transportation." Id. at 83.^{8/} The Pfeiffer Court stressed that extending LHWCA coverage to workers involved in any portion of the cargo moving process would best effectuate the congressional goal of "a simple, uniform standard of coverage." Id. These two cases are credited with having created a

8/ More recently, in Director, OWCP v. Perini North River Assoc., 459 U.S. 297 (1983), the Court has emphasized that the Act is to be "liberally construed" and has reaffirmed that Congress intended the amended Act to "extend" coverage and protect "additional" workers. 459 U.S. at 315-16 (quoting legislative history).

"functional relationship" test for LHWCA status: if a job is functionally related to the movement of maritime cargo, it is maritime employment for the purpose of LHWCA coverage.

Following these authorities, the Court of Appeals for the Fourth Circuit found a railroad employee whose responsibilities included maintaining and repairing equipment and structures used in loading and unloading vessels to be engaged in maritime employment within the terms of the LHWCA.^{9/} In Price v.

9/ Although railroad workers generally are required to seek damages for work-related injuries under the FELA, it is well settled that railroad company employees must be compensated under the LHWCA if they are injured while engaged in maritime employment. See Pennsylvania R.R. v. O'Rourke, 344 U.S. 334 (1953); Nogueira v. New York, N.H & H.R.R., 281 U.S. 128 (1930). Congress has never amended either Act

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Norfolk & Western Railway, 618 F.2d 1059 (4th Cir. 1980), the court found that the employee, who was injured while painting a tower supporting the conveyor belt system used to transport grain to the holds of nearby vessels, was required to seek his remedy under the LHWCA. To reach the conclusion that this worker was a maritime employee, the panel reasoned that:

- (1) the equipment being maintained by the claimant was essential to the loading and unloading of vessels at the port; and
- (2) the maintenance and repair of longshoring machinery and equipment is as essential to the movement of maritime cargo as the actual loading and unloading of ships.

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to permit choice of coverage, or to exempt railroad employees from the LHWCA, despite over 50 years of case law construing the LHWCA to provide exclusive coverage.

Id. at 1061. The Price court expressly disagreed with White v. Norfolk & Western Railway, id. at 1062, finding the reasoning in a Benefits Review Board decision to be more persuasive:

Merely because a waterfront mechanic is not directly involved in the actual loading or unloading of cargo does not remove him from the coverage of the amended Act. The maintenance and repair of long-shoring machinery and equipment is essential to the movement of maritime cargo and, thus, such an employee's duties are included in the broad, concept of maritime employment.

Bradshaw v. McCarthy, 3 Ben. Rev. Bd. Serv. (MB) 195, 198 (1976), petition for review denied, 547 F.2d 1161 (3d Cir. 1977), quoted in Price v. Norfolk & Western Railway, 618 F.2d at 1061 (emphasis added).

In Harmon v. Baltimore & Ohio Railroad, 741 F.2d 1398 (D.C. Cir. 1984), the Court of Appeals for the D. C. Circuit reached the same conclusion with regard to a railroad carpenter who was injured while repairing a hopper through which coal passes during the loading process. Adopting the Pfeiffer standard of coverage for employees "engaged in intermediate steps of moving cargo," the Harmon court reasoned that, since coal-loading equipment is essential to the movement of maritime cargo from railcars to ships, "the repair and maintenance of that equipment must also be considered as an integral part in the loading and unloading of ships." 741 F.2d at 1403-04.

Other circuits have similarly applied the functional relationship test

THE SECRETARY OF THE
TREASURY
WASHINGTON, D. C.
JANUARY 1, 1900
SIR:
I have the honor to acknowledge the receipt of your letter of the 29th inst. in relation to the proposed amendment to the act of March 3, 1879, relating to the collection of duties on imports of foreign goods.
The proposed amendment is as follows:
"That the duties on imports of foreign goods shall be collected in advance of the delivery of such goods to the consignee, and the same shall be paid to the collector of the port of destination, and the receipt therefor shall be given to the consignee."
The proposed amendment is in accordance with the provisions of the act of March 3, 1879, relating to the collection of duties on imports of foreign goods, and it is the policy of the Department to carry out the provisions of such act.
Very respectfully,
J. D. BROWN,
Secretary of the Treasury.

derived from Caputo and Pfeiffer, in deciding that workers who maintain or repair equipment essential to loading vessels are maritime employees for LHWCA purposes.^{10/} Illustrative cases include Sea-Land Services, Inc. v. Director, OWCP, 685 F.2d 1121, 1123 (9th Cir. 1982) (repair and maintenance of equipment necessary to loading ships integral

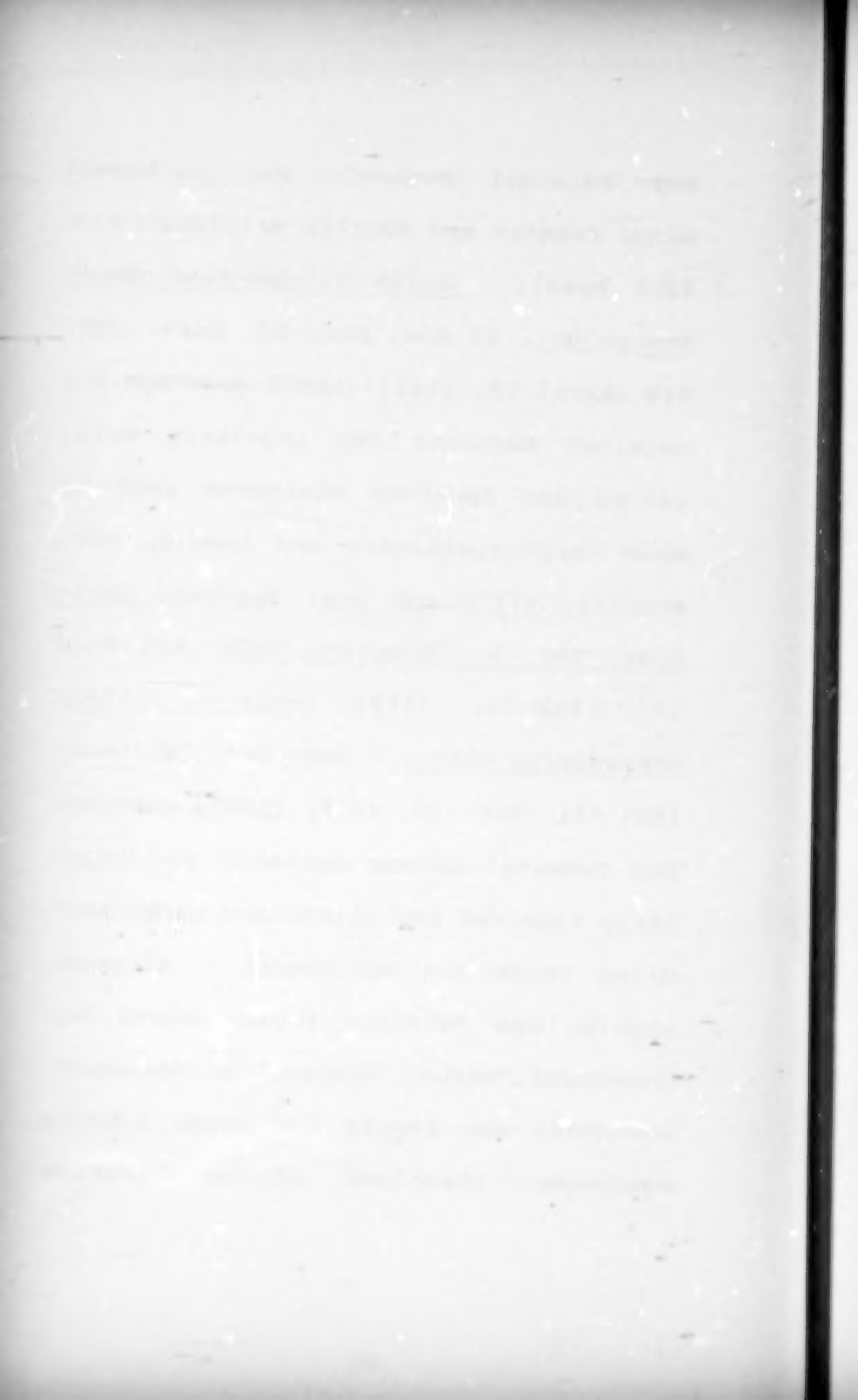
10/ Although this Court has never specifically addressed the issue, it has suggested in dicta that mechanics who maintain loading equipment are engaged in maritime employment. In Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985), the Court refused to extend LHWCA coverage to a welder working on a fixed off-shore drilling platform. In language important to this case, the Court pointedly remarked that the employee's "work had nothing to do with the loading or unloading process, nor [was] there any indication he was even employed in the maintenance of equipment used in such tasks." 470 U.S. at 425 (emphasis supplied). Furthermore, this Court has held that the specific jobs named in § 902(3) comprise only "a part of the larger group of activities that make up 'maritime employment'" P.C. Pfeiffer Co. v. Ford, 444 U.S. at 77 n.7.

to process, thus "maritime employment" for LHWCA); Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750, 755 (5th Cir. 1981) (maintenance and repair of longshoring equipment and facilities, essential and indispensable step in shiploading process, constitutes "maritime employment" for LHWCA), cert. denied, 454 U.S. 1163 (1982); Garvey Grain Co. v. Director, OWCP, 639 F.2d 366, 370 (7th Cir. 1981) (repair and general maintenance of conveyors and other loading equipment integral part of loading process, conferring LHWCA status on worker performing these tasks); Prolerized New England Co. v. Benefits Review Board, 637 F.2d 30, 37 (1st Cir. 1980) (repair and maintenance of integrated shiploading equipment qualifies

as maritime employment for LHWCA), cert. denied, 452 U.S. 938 (1981).

Administrative decisions affording LHWCA coverage to maintenance mechanics have proliferated following the 1972 legislation. In some of these decisions coverage is premised on the same rationale as Caputo, Price and Harmon: since the repair and maintenance of loading equipment is integral and essential to the movement of maritime cargo, employees who perform such work have the status of LHWCA employees. See, e.g., Wuellet v. Scappoose Sand and Gravel Co., 15 Ben. Rev. Bd. Serv. (MB) 223(ALJ) (Dec. 29, 1982) (LHWCA coverage for mechanic injured while changing conveyor belt); Jackson v. Atlantic Container Corp., 15 Ben. Rev. Bd. Serv. (MB) 473 (Aug. 24, 1983) (LHWCA coverage

for terminal mechanic who performed minor repairs and monthly maintenance on link span); Ganish v. Sea-Land Services, Inc., 13 Ben. Rev. Bd. Serv. (MB) 419 (April 28, 1981) (LHWCA coverage for terminal mechanic who regularly maintained and repaired equipment used to move cargo containers and loading personnel), aff'd sub nom. Sea-Land Services, Inc. v. Director, ONCP, 685 F.2d 1121 (9th Cir. 1982); Lewis v. Pittson Stevedoring Corp., 7 Ben. Rev. Bd. Serv. (MB) 691 (Feb. 10, 1978) (LHWCA coverage for terminal garage mechanic who regularly repaired and maintained cargo handling tools and equipment). Alternatively, the Benefits Review Board has construed "harbor workers" to encompass mechanics who repair the cargo loading equipment installed at a maritime



terminal. See Stewart v. Brown & Root, Inc., 7 Ben. Rev. Bd. Serv. (MB) 356, 365 (Jan. 12, 1978) ("harbor workers" defined to include "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)" for purposes of the LHWCA status test).

These administrative decisions are not cited as meriting special deference by federal courts, cf. Kelaita v. Director, OWCP, 799 F.2d 1308, 1310 (9th Cir. 1986); rather they exemplify the consistent pattern of judicial and administrative decisions, of which Congress would have been aware in 1984, in which terminal mechanics who repair loading

equipment are deemed § 902(3) maritime employees. Against this background, it is highly significant that the 98th Congress did not exclude maintenance mechanics (or railroad employees) when it otherwise restricted the scope of § 902(3) in the 1984 amendments.^{11/} See Lorillard v. Pons, 434 U.S. 575, 580 (1978) (Congress presumed aware of particular interpretations of legislative provisions when it reenacts statutory language without change). The conclusion that Congress implicitly adopted these prior judicial and administrative interpretations is more compelling when the "status" restrictions that were

11/ In fact, a 1980 proposal to expressly exclude, inter alia, workers engaged in "maintenance, or repair of gear or equipment" died in Committee. See Herb's Welding v. Gray, 470 U.S. 414, 423 n.9 (1985).

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added by the 1984 amendments are considered. After LHWCA benefits had been awarded in the early 1980's to security workers, museum employees, restaurant employees, and workers repairing recreational vessels under sixty-five feet in length, it is hardly fortuitous that Congress excluded such workers from coverage in §§ 902(3)(A), (B), and (F). Cf., e.g., McCarthy v. The Bark Peking, 716 F.2d 130 (2d Cir. 1983) (according LHWCA status to worker painting museum vessel), cert. denied sub nom. South Street Seaport Museum v. McCarthy, 465 U.S. 1078 (1984); Arbeeney v. McRoberts Protective Agency, 642 F.2d 672 (2d Cir.) (according LHWCA status to pier security guards), cert. denied, 454 U.S. 836 (1981); Mississippi Coast Marine, Inc. v. Bosarge, 637 F.2d 994 (5th Cir.)

(according LHWCA status to marine carpenter who repaired recreational vessels up to sixty feet in length), modified on other grounds, 657 F.2d 665 (1981); Cefaratti v. Mike Fink, Inc., 83 LHWCA-1992 (according LHWCA status to restaurant worker), aff'd, 17 Ben. Rev. Bd. Serv. (MB) 95 (Feb. 27, 1985). The legislative history explaining the purpose of the 1984 amendments to § 902(3) expressly states:

[I]t is the intention of the Committee neither to expand nor to contract the current coverage of the Longshore Act. The Committee concurs with the view of the Senate Committee on Labor and Human Resources in this regard, which stated ". . . with the committee making only limited changes to [these sections] of the act, it is obvious that a large body of decisional law relative to traditional maritime employers [sic] and harbor workers remains undisturbed."

H.R. Rep. No. 570, Part I, 98th Cong., 2d Sess. 5, reprinted in 1984 U.S. Code Cong. and Ad. News 2734, 2738 (1984) (emphasis added). To paraphrase Andrus v. Glover Construction Co., 446 U.S. 608, 616-17 (1980): where Congress explicitly enumerates certain exceptions to coverage, additional exceptions are not to be implied.

In 1977, without the guidance of Caputo and Pfeiffer, the Supreme Court of Virginia held that a railroad mechanic who maintained and repaired loading equipment at the Norfolk coal piers was not a LHWCA employee because he was "not directly involved in the loading of coal." White v. Norfolk & Western Railway, 217 Va. at 832, 322 S.E.2d at 833 (emphasis in original). Focusing on the fact that plaintiff was

"not actually handling any cargo, either manually or mechanically," 217 Va. at 833, and borrowing language from Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 961 (9th Cir.) ("realistically significant relationship to 'traditional maritime activity'"), cert. denied, 429 U.S. 868 (1976)^{12/} and Jacksonville

12/ The Weyerhaeuser opinion is inapposite authority for analyzing the status of workers at a commercial loading pier: the Weyerhaeuser plaintiff was a pondman injured while working on a sawmill log pond, not a repairman maintaining shiploading equipment beside a deep water pier. See 528 F.2d at 961 (pondman's work not maritime employment in traditional sense; no "realistically significant relationship" to traditional maritime activity involving navigation and commerce on navigable waters). As pointed out in Boudreaux v. American Workover, Inc., 680 F.2d 1034, 1049 (5th Cir. 1982), Weyerhaeuser formulated its "significant relationship" status test from language in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), which addressed the separate question of federal admiralty jurisdiction in claims arising from aviation accidents. The Weyerhaeuser holding does

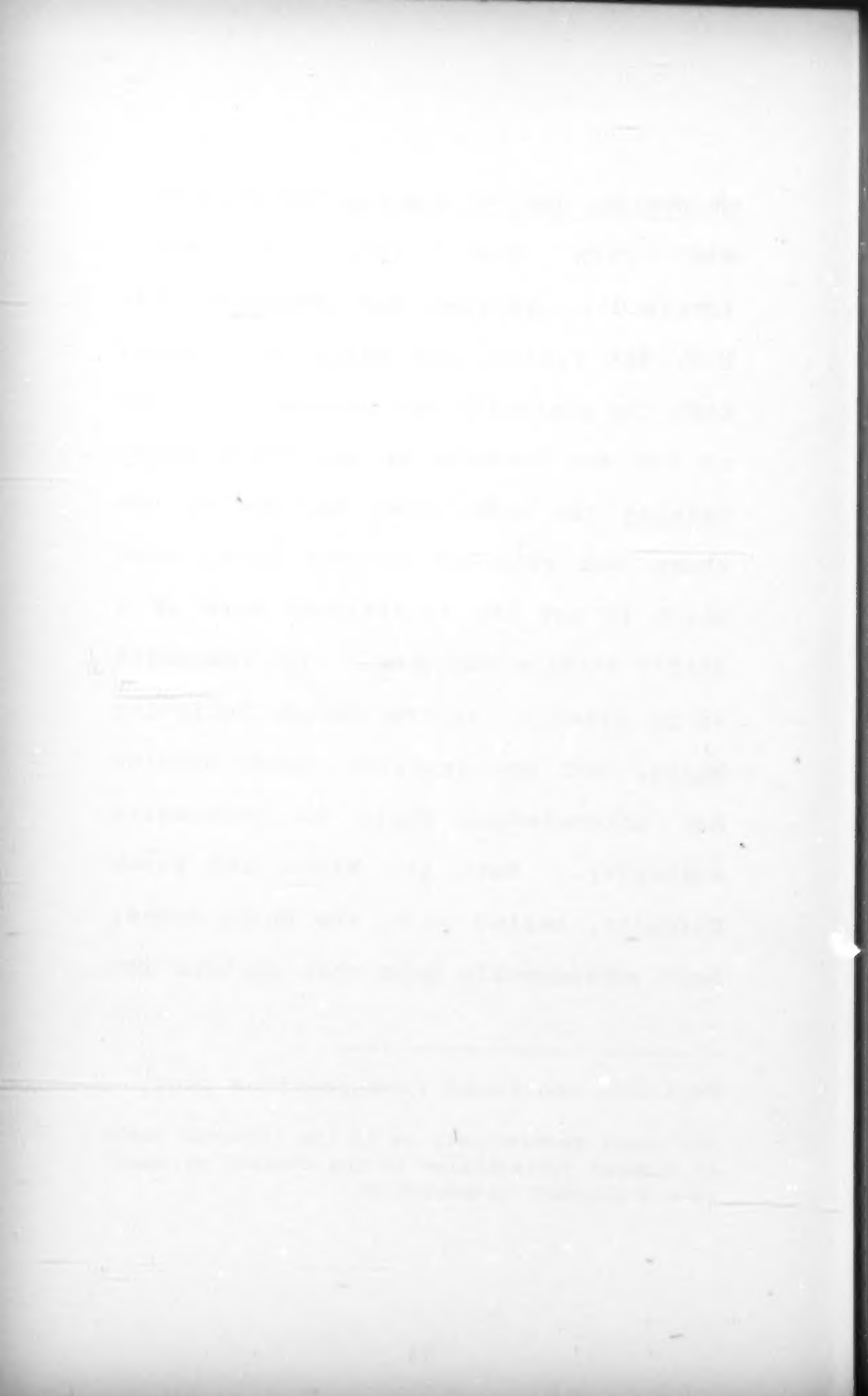
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Shipyards, Inc. v. Perdue, 539 F.2d 533, 539 (5th Cir. 1976) ("directly involved"), vacated and remanded, 433 U.S. 904 (1977), the White court found that the plaintiff was outside the scope of the Act because he was "only maintaining the electrical devices on the shore and attached to the pier, work which is not the traditional work of a ship's service employee." Id. (emphasis in original). In the decade following White, not one reported court opinion has acknowledged White as persuasive authority. Both the Ninth and Fifth Circuits, relied on by the White court, have subsequently held that workers who

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not speak persuasively as to the intended reach of federal jurisdiction in the context of maritime employment compensation.



repair and maintain shiploading equipment are within the scope of the LHWCA. See, e.g., Sea-Land Services, Inc. and Hullinghorst Industries, Inc., both supra.

Given the tenuous underpinnings of White and the subsequent clarification of the LHWCA status test in the federal fora, the lower courts in Virginia had inferred that they were no longer bound under stare decisis to follow White. See, e.g., Opinion of Judge Stephens in Turnista v. Chesapeake & Ohio Railway, No. 8690-WS (Newport News Circuit Court May 21, 1984), 49A, 61A-62A (respectfully declining to follow White and concluding Price is controlling); Opinion of Judge Waters in Goode, 10A (federal authorities controlling on issue of application of federal statute); Opinion

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of Judge Smith in Schwalb, 39A (relying on interpretations of LHWCA expressed by U.S. Supreme Court); and Opinion of Judge Schlitz in McGlone, 47A (conflict between state and federal authority must be resolved in favor of latter). Doubtless Virginia's trial judges were as surprised as the railroads' counsel when the Supreme Court of Virginia used its review of the Schwalb and McGlone appeals not to reject, but to reaffirm the vitality of its White rationale. In its March 4, 1988 opinion, the Schwalb-McGlone court opined that Congress did not intend the 1972 amendments to "have such pervasive and preclusive effects" as had been attributed to them by, for example, the Fourth Circuit Court of Appeals in Price. 235 Va. at 32. Rejecting again the functional

relationship formula that has, since White, been the linchpin of the LHWCA status test, id. at 31, the Supreme Court of Virginia regressed to an illogical demarcation of coverage where "workers who perform purely clerical tasks" are indistinguishable from workers who perform repairs and maintenance "such as painting" (a clear reference to Price), id. at 33, both groups failing to fulfill the Virginia Supreme Court's rigid requirements for LHWCA coverage. The court recast its LHWCA status test in terms of an "essential elements" standard, which it described as "more nearly akin to the 'significant relationship' standard . . . adopted in White than the 'overall process' construction invoked by the defendant." Id. Thus clothed in semantics, the

court ruled that Schwalb and McGlone were non-covered workers, "perform[ing] purely housekeeping and janitorial tasks." Id.^{13/}

Under any of the federal or administrative authorities construing § 902(3) since the 1972 amendments, respondent Goode would clearly be a maritime employee, either as a harbor worker or as a person engaged in

13/ Both Schwalb and McGlone were pierside mechanical workers at a coal loading maritime terminal similar to Lambert's Point. Their primary job responsibility was to ensure the continuous functioning of coal loading equipment by retrieving accumulations of coal from around and beneath the loading equipment and conveyor belts. Schwalb was injured on her way to perform a thorough cleaning of the trunnion rollers that rotate the dumper; McGlone was injured while blowing trapped coal from beneath the moving conveyor belt with an air hose. Even the Virginia Supreme Court acknowledged that failure to remove these coal accumulations would eventually cause malfunctions and interruptions in the coal loading process. 235 Va. at 29.

longshoring operations. The Virginia Supreme Court's memorandum decision in Goode, issued the month after the Schwalb-McGlone decree, evinces the state court's unyielding refusal to analyze the functional relationship of specific pierside jobs to the loading process, and signals the court's apparent intention to exclude all but those labeled longshoremen and shipbuilders from LHWCA benefits.^{14/} The Virginia Supreme Court is now entrenched in its

14/ The Virginia Supreme Court's rationale would also bar from LHWCA coverage workers who maintain or repair shipbuilding or shiprepair equipment. This position conflicts directly with the Fourth Circuit's holding in Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978), and ignores this Court's repeated observation that the maritime occupations specifically listed in § 902(3) were not intended to be exclusive. See Herb's Welding, 470 U.S. at 421 n.9; P. C. Pfeiffer, 444 U.S. at 77-78 n.7.

defiant disavowal of controlling federal precedent, requiring redress through the mechanism of this Court's review.

II. The Virginia Supreme Court decision offends the congressional goal of a uniform standard

Disdaining the federal courts' uniform interpretation of the LHWCA status test, the Virginia Supreme Court has flouted the congressional mandate to apply a "simple, uniform standard of coverage," and has ignored the instruction of Caputo, P.C. Pfeiffer, and their progeny. Maintaining uniformity in the application of the LHWCA is at least as important today as it was when the Court granted certiorari in Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962).

Decisions of the United States Supreme Court are final and

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authoritative with respect to the construction and application of federal statutes. Monessen Southwestern Railway v. Morgan, 56 U.S.L.W. 4494 (U.S. June 6, 1988). Absent clear words to the contrary, construction of the language in a federal statute is a federal question. Western Air Lines v. Board of Equalization, 480 U.S. ____, 94 L.Ed.2d 112, 119 (1987). A state court is not free to follow its own dictates or precedent in areas of federal substantive law in the face of federal authority to the contrary. Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942). As this Court admonished in an earlier demonstration of independence by the Supreme Court of Virginia:

[T]he vice of this position is that, in following its own prior decision, the court ignored the decision of this

court to the contrary. This lawfully it could not do, the question, as we have shown, being a federal question to be determined by the application of federal law. The determination by this court of that question is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding.

Chesapeake & Ohio Railway v. Martin, 283 U.S. 209, 220-221 (1931).

The mischief created by this aberrant state court decision will not be limited to the parties in this action. The judges in Virginia's trial courts, as well as administrative law judges hearing Virginia cases, must now immediately confront the dilemma of divergent authority within the state on the threshold question of jurisdiction. Employers in Virginia now face uncertainty as to their responsibility to

secure compensation under the LHWCA.^{15/}
An indirect consequence of the Virginia Supreme Court decision will be "forum shopping" by, for example, pierside railroad workers in other states who seek to avoid the exclusive jurisdiction of the LHWCA. Due to the vagaries of Virginia's venue statute, a resident of any state can bring an action in Virginia against an employer that does business in the state of Virginia; the action is not vulnerable to dismissal or transfer even if the plaintiff and all witnesses reside in another state and

15/ The practical problems engendered by this uncertainty are comprehensively described in the Brief of Association of American Railroads and National Association of Railroad Trial Counsel as Amici Curiae in support of the Petition for Writ of Certiorari in Schwalb-McGlone, at 8-11. The relevant portions of this brief are reprinted in the appendix at 65A-70A.

the accident occurred outside Virginia. Va. Code § 8.01-265 (1950 as amended).^{16/} If the Goode decision stands uncorrected, there is little doubt that Virginia courts will soon be inundated by foreign FELA actions, brought by maritime plaintiffs escaping the federal and state courts elsewhere that adhere to the federal standard. This is hardly the result Congress intended when it amended the LHWCA to establish a simple, uniform standard of coverage.

To allow the Virginia Supreme Court decision to stand would frustrate the spirit and purpose of the LHWCA, create

16/ The Supreme Court of Virginia has recently agreed to hear argument on the constitutionality of this statute. Seaboard Systems Railroad, Inc. v. Caldwell, Record No. 870490 (Va. Sup. Ct.) (presently pending argument).

a favored class of maritime employees, perpetuate a dichotomous approach to the LHWCA status test, and burden the courts with unnecessary litigation.

CONCLUSION

For the above reasons, petitioner Norfolk and Western Railway Company respectfully submits that this petition should be granted and that the judgment by the Supreme Court of Virginia should be reversed.

Respectfully submitted,

NORFOLK AND WESTERN RAILWAY
COMPANY

By Edward L. Oast, Jr.

Edward L. Oast, Jr.
John Y. Richardson, Jr.
Joan F. Martin
Williams, Worrell, Kelly & Greer, P.C.
600 Crestar Bank Building
Norfolk, Virginia 23510

is required, either at written or verbal
interviews or by telephone approach to the
line station agent, and under the terms
each necessary provision.

TERMS

For the above reasons, the
Chicago and North Western Railway Company
respectfully requests that this contract
should be created and that the payment
of the balance due to Chicago should
be retained.

Respectfully submitted,

CHICAGO AND NORTH WESTERN RAILWAY
Company

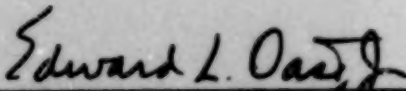
Wm. L. Dill

Edward E. Hart, Jr.
John F. Richardson, Jr.
John F. Hart
William W. Hart, Jr.
500 Cass Street
Chicago, Illinois

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Petition for a Writ of Certiorari upon the Respondent, Robert T. Goode, Jr., at the office of his counsel of record, Bruce A. Wilcox, P.O. Box 3747, Norfolk, Virginia 23514, pursuant to the requirements of Rules 28 and 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class postage prepaid, addressed to Respondent as set forth above, on or before July 21, 1988.

I further certify that I am a member of this Court, and that all parties required to be served have been served on or before July 21, 1988.



Edward L. Oast, Jr.
Of Counsel for Petitioner

APPENDIX

1. Opinion of the late Judge Charles R. Waters, II, of the Circuit Court of the City of Norfolk, Virginia, dated November 13, 1986, in the case of Goode v. Norfolk & Western Railway1A
2. Order of the Circuit Court of the City of Norfolk, Virginia, dated December 17, 1986, dismissing the case of Goode v. Norfolk & Western Railway15A
3. Order of Supreme Court of Virginia, dated April 22, 1988, reversing and remanding the case of Goode v. Norfolk & Western Railway17A
4. Opinion of Supreme Court of Virginia, dated March 4, 1988, in the cases of Schwalb v. Chesapeake & Ohio Railway and McGlone v. Chesapeake & Ohio Railway19A
5. Opinion of Judge Douglas M. Smith of the Circuit Court of the City of Newport News, Virginia, dated August 8, 1984, in the case of Schwalb v. Chesapeake & Ohio Railway37A

ARTICLE

Section 1. The City of New York, in and for the County of New York, do hereby certify that the following is a true and correct copy of the original of the same as the same appears in the files of the City of New York.

Section 2. The City of New York, in and for the County of New York, do hereby certify that the following is a true and correct copy of the original of the same as the same appears in the files of the City of New York.

Section 3. The City of New York, in and for the County of New York, do hereby certify that the following is a true and correct copy of the original of the same as the same appears in the files of the City of New York.

Section 4. The City of New York, in and for the County of New York, do hereby certify that the following is a true and correct copy of the original of the same as the same appears in the files of the City of New York.

Section 5. The City of New York, in and for the County of New York, do hereby certify that the following is a true and correct copy of the original of the same as the same appears in the files of the City of New York.

Section 6. The City of New York, in and for the County of New York, do hereby certify that the following is a true and correct copy of the original of the same as the same appears in the files of the City of New York.

6. Opinion of Judge Lester E. Schlitz of the Circuit Court of the City of Portsmouth, dated May 29, 1985, in the case of McGlone v. Chesapeake & Ohio Railway40A

7. Opinion of Judge J. Warren Stephens of the Circuit Court of the City of Newport News, Virginia, dated May 21, 1984, in case of Turnista v. Chesapeake & Ohio Railway49A

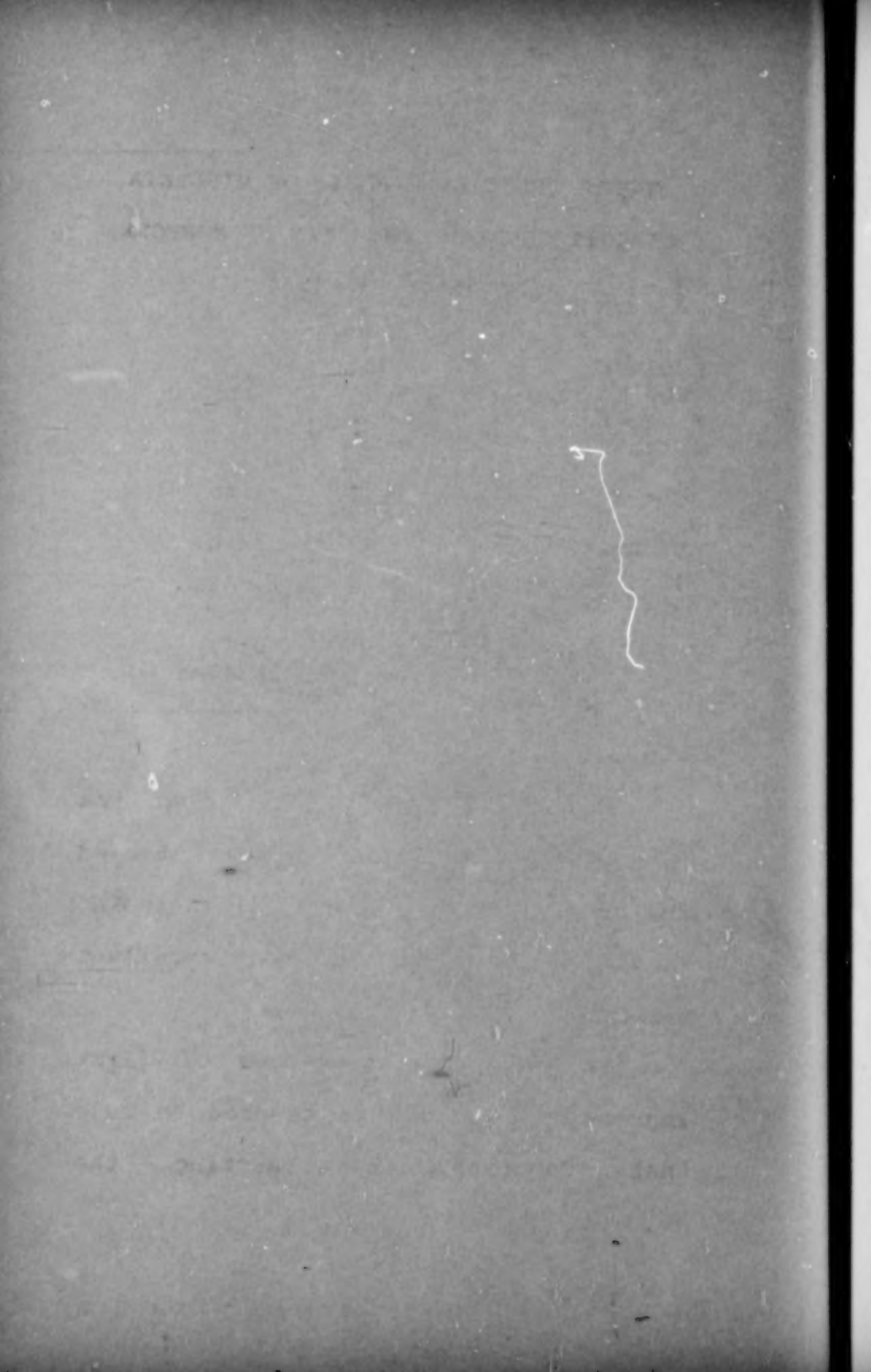
8. Excerpt of Brief of Association of American Railroads and National Association of Railroad Trial Counsel as Amici Curiae in Support of Petition for a Writ of Certiorari in Chesapeake & Ohio Railway v. Nancy J. Schwalb and William McGlone, docketed as No. 87-1979, U.S. Supreme Court65A

9. 33 U.S.C.A. § 902(3) (West 1986).....71A

10. 33 U.S.C. § 902(3) as amended in 1972 but prior to 1984 Amendment.....74A

11. 33 U.S.C.A. § 905 (West 1986)75A

12. 45 U.S.C.A. § 51 (West 1986)77A



FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

November 13, 1986

Eddie W. Wilson, Esquire
2200 Colonial Avenue, Suite 12-B
P. O. Box 11168
Norfolk, Virginia 23517

John Y. Richardson, Jr., Esquire
Williams, Worrell, Kelly & Greer
600 United Virginia Bank Building
P. O. Box 3416
Norfolk, Virginia 23514-3416

Re: Robert T. Goode, Jr. vs.
Norfolk and Western Railway Co.
At Law No. L-86-335

Gentlemen:

Thank you for the help that you have given the court. I have studied all of the material supplied, including the opinions cited in your excellent briefs.

If this case were one of first impression, I would be tempted to rule that Congress, by enacting the

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Longshoremen's and Harbor Workers' Compensation Act (L.H.W.C.A.), did not intend to strip a railroader of any of his benefits under the Federal Employer's Liability Act (F.E.L.A.) under any circumstances so long as he was working for the railroad at the time of injury, a narrow, unintellectual approach which makes good sense.

The duty of this court, however, is not to make law but to interpret and follow the law as set forth by courts of higher dignity. In following that duty, I feel that I am directed by the existing law to rule that, under the particular facts of this case, the motion for judgment must be dismissed for reason that exclusive jurisdiction lies within the ambit of the L.H.W.C.A.

Railroad cars filled with coal come cross country in both interstate and intrastate commerce and come to rest in what is called the barney yard located near pier 6 at the Lambert's Point terminal in Norfolk, Virginia. After the coal has come to rest in the barney yard, the process of loading the coal into vessels begins. The loaded cars are moved from the barney yard through a thawing shed, and are then pushed up a raised track by small locomotives called pushers onto the dumper located near the piers. As these loaded cars are pushed on to the dumper, their progress is slowed or stopped by equipment known as a retarder. The cars revolve, dumping the coal onto conveyor belts which deliver the dumped coal directly into the holds of waiting vessels docked at

The following are listed with their
corresponding to both interests and
technical evidence and also of value in
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have been to the various parts for
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a conveyor. The coal is then being
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the point of loading tracks and as

the piers. The empty cars are pushed to the apex of the raised track and then, through the force of gravity, are returned to a holding yard from where they will again be dispatched to coal fields located in various parts of the country.

The plaintiff was a machinist who was injured while repairing the retarder on the dumper located near pier 6. The dumper and retarder on which the plaintiff was working are located 500 to 550 feet from the water. Retarders are located throughout the railroad system; however, the sole purpose of this retarder was to stop the loaded cars on the dumper to facilitate the transportation of coal from shore to vessel by dumping the coal on conveyor belts which feed the coal into the belly of docked

vessels at pier 6. The entire loading operation at pier 6 must cease when the retarder is inoperative or is being repaired, and the loading operation had in fact ceased at the time of the injury to the plaintiff.

Machinists may be assigned to what is known as the Motive Power Department which has the function of maintaining and operating the coal dumping facility of the railroad. Machinists may be assigned to different locations such as the 38th Street car shop or the roundhouse, which may be miles away from the water, or they may be assigned to Lambert's Point. The location is determined by seniority, and a machinist working at the pier at Lambert's Point may be forced to work at another location because of the electing of a more

senior machinist to work at the pier. At the time of the accident, the plaintiff had been assigned for some time to work at Lambert's Point. While assigned to Lambert's Point, machinists spend the overwhelming portion of their working time maintaining and repairing machines and equipment essential to the coal dumping operation. Machinists do not, for example, regularly repair cars for that is the job of the trainmen. The great majority of the working time of a machinist while assigned to Lambert's Point is spent on the maintenance and repair of machinery which facilitates the dumping operation after the cars have left the barney yard. The machinists are required to pay into the railroad retirement plan and are subject to the Railway Labor Act.

Under the facts of this case, the railroad is an employer within the meaning of the L.H.W.C.A., Noqueira v. New York, N.H. & H.R. Co., 281 U.S. 128, 132, 44 L.Ed. 754, 50 S.Ct. 303 (1930), and the plaintiff is an employee within the meaning of the L.H.W.C.A., Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 53 L.Ed. 2d 320, 97 S.Ct. 2348 (1977); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 62 L.Ed. 2d 255, 100 S.Ct. 328 (1979), and he cannot walk in and out of coverage because, I believe, that the overwhelming portion of his work is essential to the loading and unloading operation.

The Supreme Court in Herb's Welding v. Gray, ____ U.S. ____, 84 L.Ed. 2d 406 (1985), while holding that a welder working on a fixed offshore oil-drilling

platform was not engaged in maritime employment within the meaning of L.H.W.C.A., has stated:

But Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading. (Emphasis added).

We have never read 'maritime employment' to extend so far beyond those actually involved in moving cargo between ship and land transportation. (Emphasis added).

On the facts of this case, I hold that the plaintiff was involved in the essential elements of loading and unloading and that he was actually involved in moving cargo between ship and land transportation. After all, the entire loading operation ceased during the repair of the retarder on which the plaintiff was working when injured. The

Director was not engaged in activities

relating to within the building

at 11:00 A.M. on 1/15/50

and the above said was not
found at 11:00 A.M. on 1/15/50
with all the papers and to
check these papers on the
same day and found in the
general vicinity of building
and surrounding area.

We have never had any
employment record on the
same day and 1/15/50
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On the basis of this case, I have
and the building was involved in the
general vicinity of building and
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involved in moving papers between this
and last investigation. When 1/15/50
and last investigation papers were
the result of the search in which the
building was not involved in 1/15/50.

location of the retarder was on the dumper, and the sole purpose of this particular retarder was to stop coal-loaded cars so that the coal could be dumped onto the belts feeding the vessel. It must be remembered that plaintiff's supervisors testified that 99 percent of the work of a machinist assigned to Lambert's Point was the maintenance and repair of machines and equipment directly and solely related to the loading and unloading operation. Even the most biased witnesses could not seriously testify that less than 50 percent of the work was not so related, while the machinist was assigned to Lambert's Point.

The plaintiff places a great deal of emphasis on White v. N & W. Ry. Co., 217 Va. 832 (1977), decided in the same

year as Conti v. N. & W. Ry. Co., 566 F.2d 890 (4th Cir.).

It is my belief that, under the facts of this case, the plaintiff did have "a realistically significant relationship to the loading of cargo on ships" and that he was directly involved in the process of loading coal on the vessels within the meaning of the White test. Furthermore, this case does involve a federal question, the federal authorities are therefore the more persuasive, and to the extent that White differs from significant federal decisions, the White court, in my opinion must yield.

As counsel well know, there have been a number of significant decisions subsequent to White, one of the leading decisions being Price v. Norfolk &

Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980). In my opinion, the Price court did set forth the proper test in determining whether there is exclusive coverage under the L.H.W.C.A., that test being whether the plaintiff's job was an essential element in the loading and unloading of the vessels. I hold that in this case the plaintiff's job was an essential element, although in light of the later ruling in Herb's Welding, supra, I would not hold that the painter's job in the Price case was an essential element.

I believe that Newport News Shipbuilding & Dry Dock v. Graham, 573 F.2d 167 (4th Cir.), cert. den., 439 U.S. 979, 58 L.Ed. 2d 649, 99 S.Ct. 563 (1978), fortifies my opinion in this case, and I do not think that this

opinion is in substantial conflict with Conti v. N. & W. Ry. Co., 566 F.2d 890 (4th Cir. 1977), although I do agree with the D.C. Circuit Court that even before Herb's Welding, supra, the Fourth Circuit had moved away from a test of balancing traditional railroad tasks against traditional maritime tasks. Harmon v. Baltimore & Ohio R.R., 741 F.2d 1398 (D.C. Cir 1984).

I am cognizant of my colleague's decision in Evans v. N. & W. Ry. Co. (Norfolk Circuit Court 1985), but likewise do not feel that we are in conflict. After a close reading of his decision, I believe that, under the facts of this case, Judge Clarkson would have reluctantly reached the same decision which I have reluctantly reached.

With regard to the situs test, I hold that the most important factor is the nature of the work rather than the distance from the water and that the test has been met. Graham, supra; Prolerized New England Co. v. Miller, 691 F.2d 45 (1st Cir. 1982); Prolerized New England Co. v. Ben. Rev. Bd., 637 F.2d 30 (1st Cir. 1980), cert. den. 452 U.S. 938, 101 S.Ct. 3080, 69 L.Ed. 2d 952 (1981); Sea-Land Serv. v. Director, etc., 685 F.2d 1121 (9th Cir. 1982); Garvey Grain Co. v. Director, etc., 639 F.2d 366 (7th Cir. 1981).

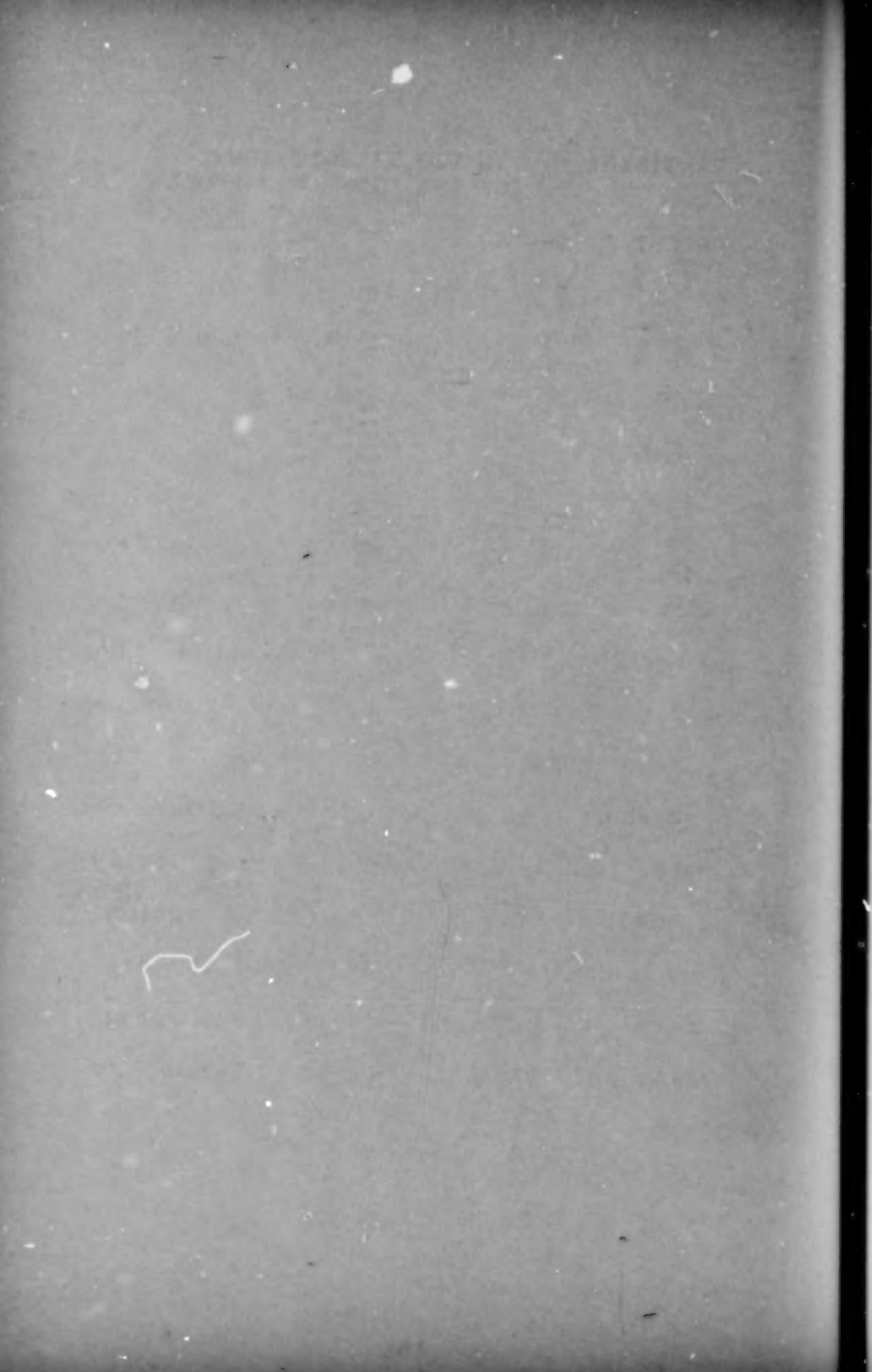
I commend both counsel for their thorough preparation for the hearing and their excellent briefs.

Mr. Richardson may prepare the order for Mr. Wilson's endorsement.

Please have the order forwarded to me
prior to November 19, 1986, if possible.

Very truly yours,

Charles R. Waters, II
Judge



VIRGINIA: IN THE CIRCUIT COURT
 OF THE CITY OF NORFOLK

ROBERT T. GOODE, JR.

Plaintiff,

v.

Docket No. L-86-335

NORFOLK & WESTERN RAILWAY CO.,

Defendant

ORDER

This day came the parties to this action, by counsel, pursuant to defendant's Motion to Dismiss on the basis that Congress has vested exclusive jurisdiction over this matter in the Longshoreman's and Harbor Workers Compensation Act, counsel having fully argued and briefed defendant's motion. The court has fully considered the evidence presented, the briefs and arguments of counsel and has filed its

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NOTES

REMARKS

DATE OF ACQUISITION

letter opinion dated November 13, 1986
which is incorporated by reference.

For the reasons set forth in
the opinion letter, it is accordingly
ORDERED that the motion be granted, and
it is accordingly ORDERED that this
action be DISMISSED WITH PREJUDICE, the
plaintiff's exceptions being so noted.

Enter this Order: 12/17/86

/s/ Charles R. Waters, II
Judge

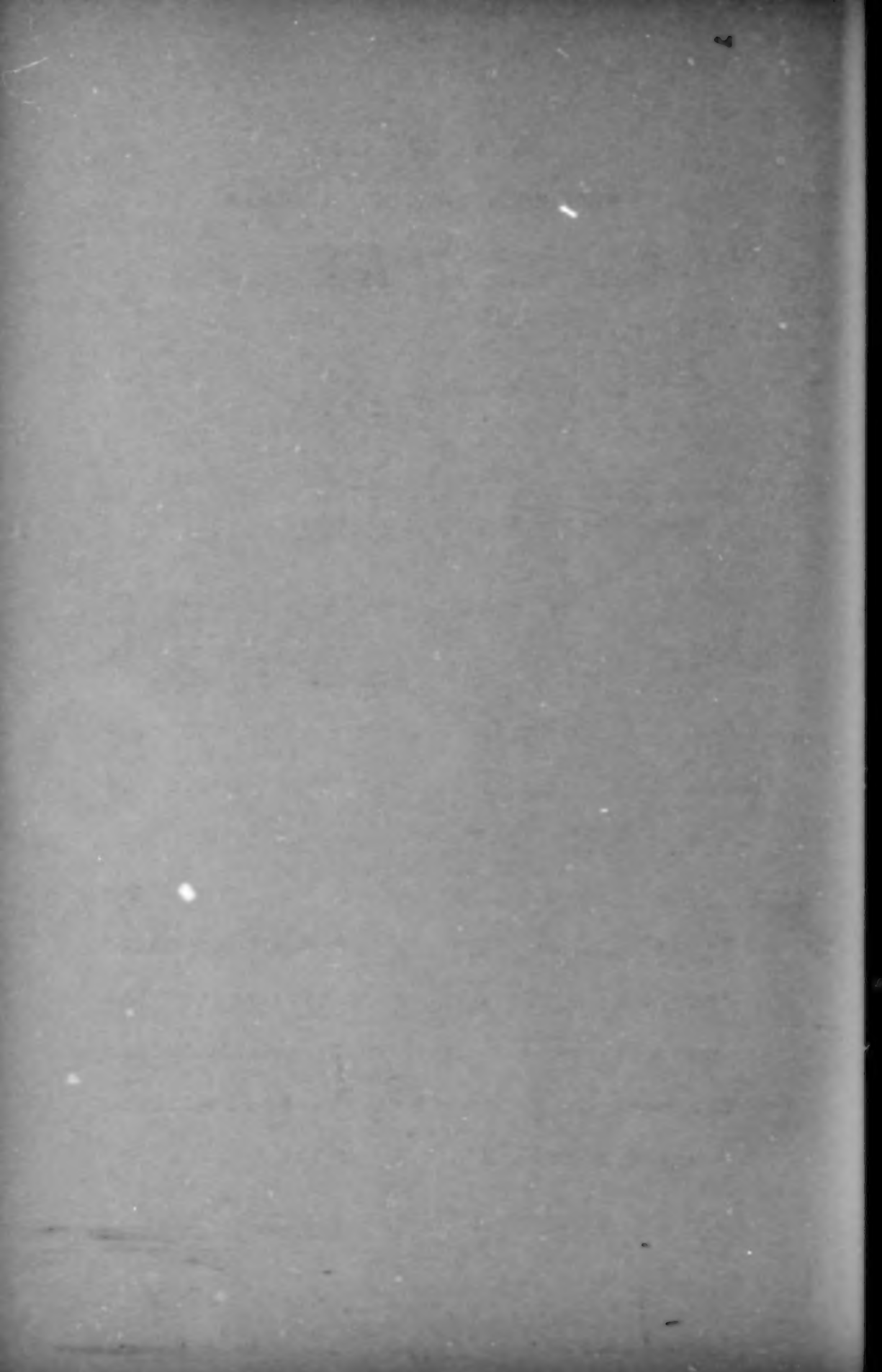
I ask for this:

/s/ John Y. Richardson, Jr. p.d.

Seen and Exceptions Noted:

/s/ Eddie Wilson p.q.

/s/ Bruce A. Wilcox p.q.



April 22, 1988

SUPREME COURT OF VIRGINIA

Record No. 870252

Circuit Court No. L86-335/L2341-86

Robert T. Goode, Jr., Appellant,
against

Norfolk & Western Railway
Company, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Norfolk on the 17th day of December, 1986.

Upon consideration of the record and briefs, and on the basis of Schwalb v. C & O Railway Co., 235 Va. ___, ___ S.E.2d ___ (1988), the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for trial on the merits.

THE HISTORY OF THE

REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

IN TEN VOLUMES

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1729.

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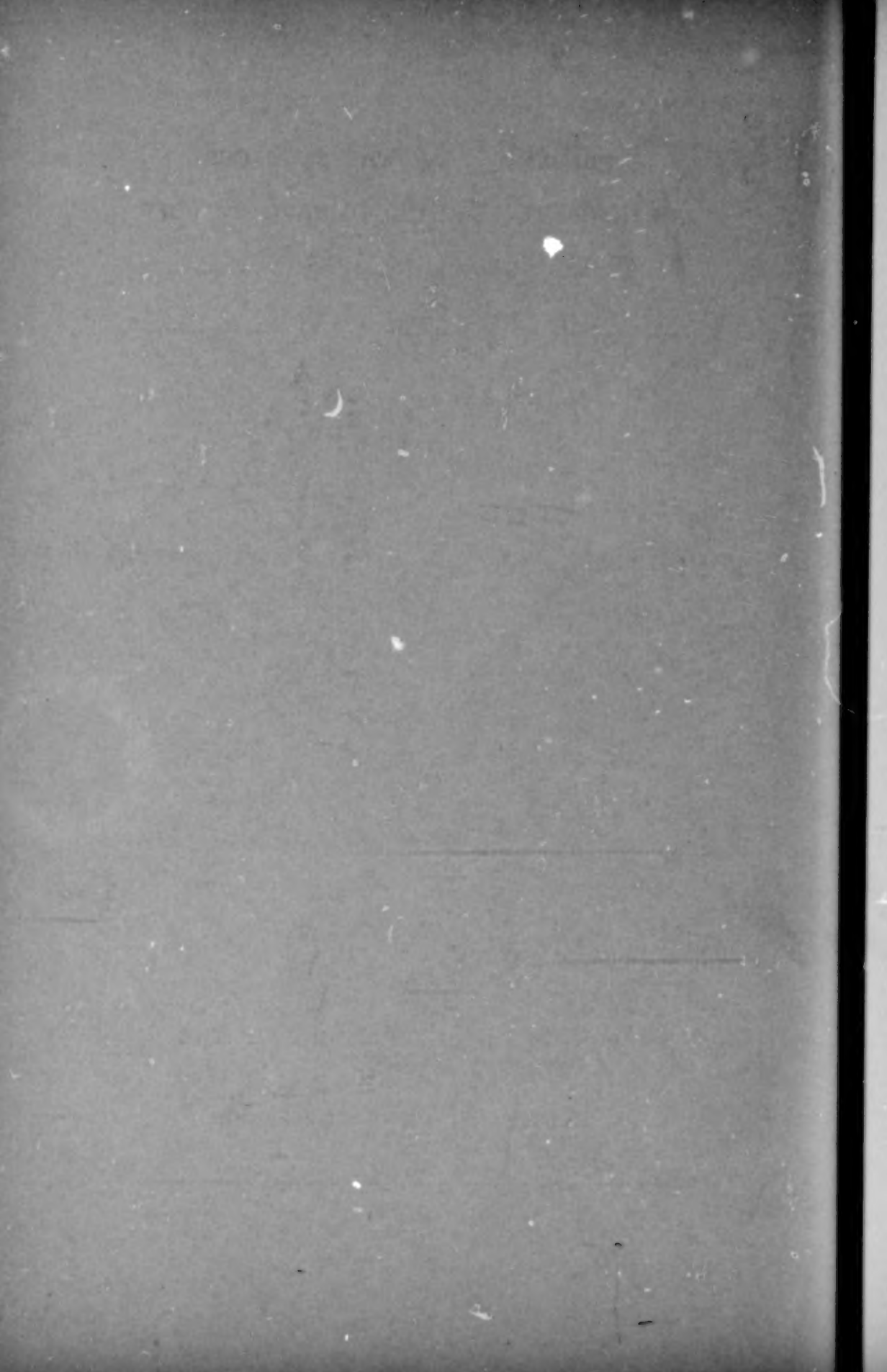
This order shall be certified
to the said circuit court.

A copy,

Teste:

David B. Beach, Clerk

By: /s/ Cynthia L. McCoy
Deputy Clerk



PRESENT: ALL THE JUSTICES
OPINION BY JUSTICE RICHARD H. POFF

March 4, 1988

Record No. 841743

NANCY J. SCHWALB

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

**FROM THE CIRCUIT COURT OF THE
CITY OF NEWPORT NEWS**

Douglas M. Smith, Judge

Record No. 850728

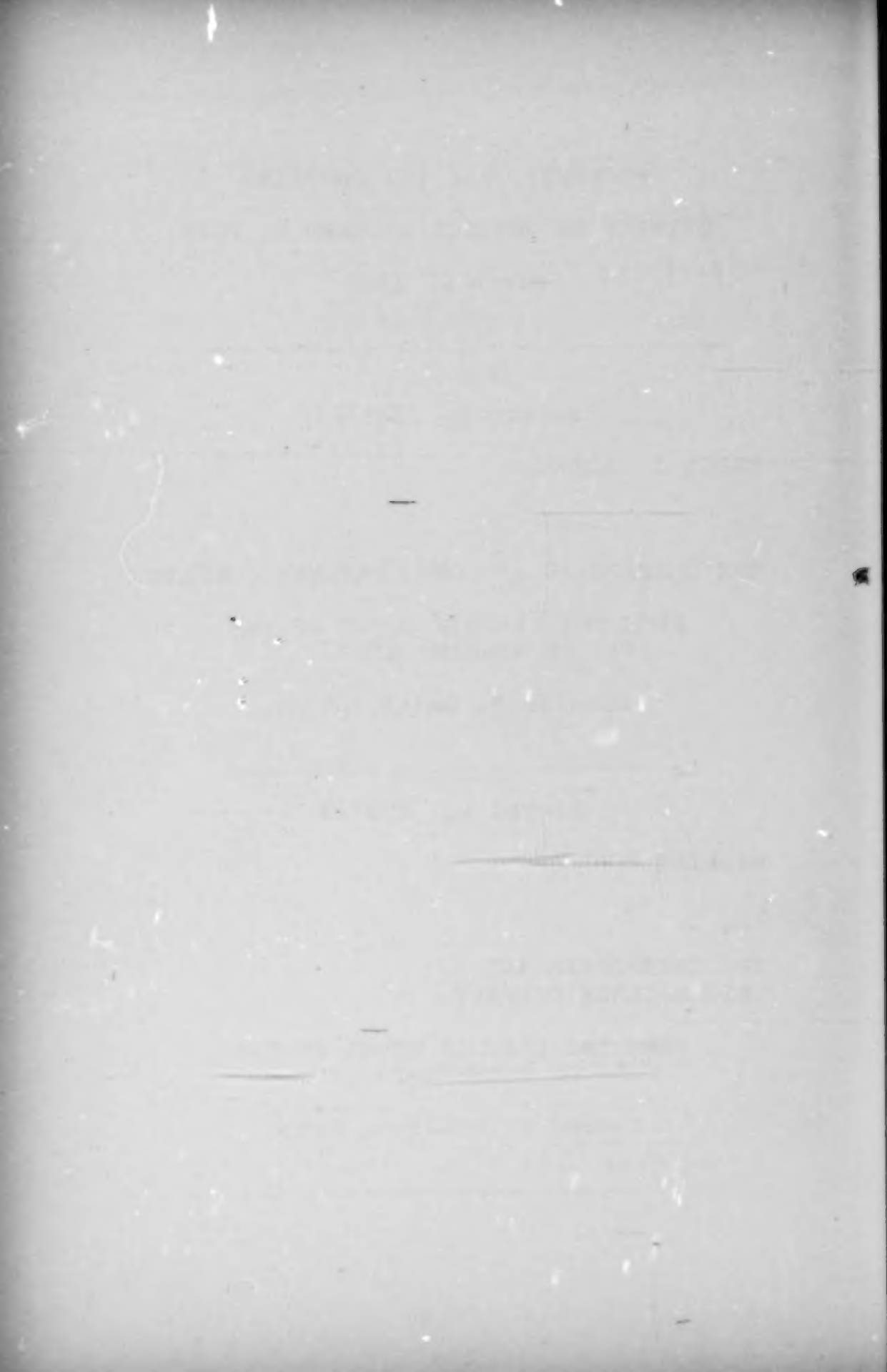
WILLIAM MCGLONE

v.

**THE CHESAPEAKE AND
OHIO RAILWAY COMPANY**

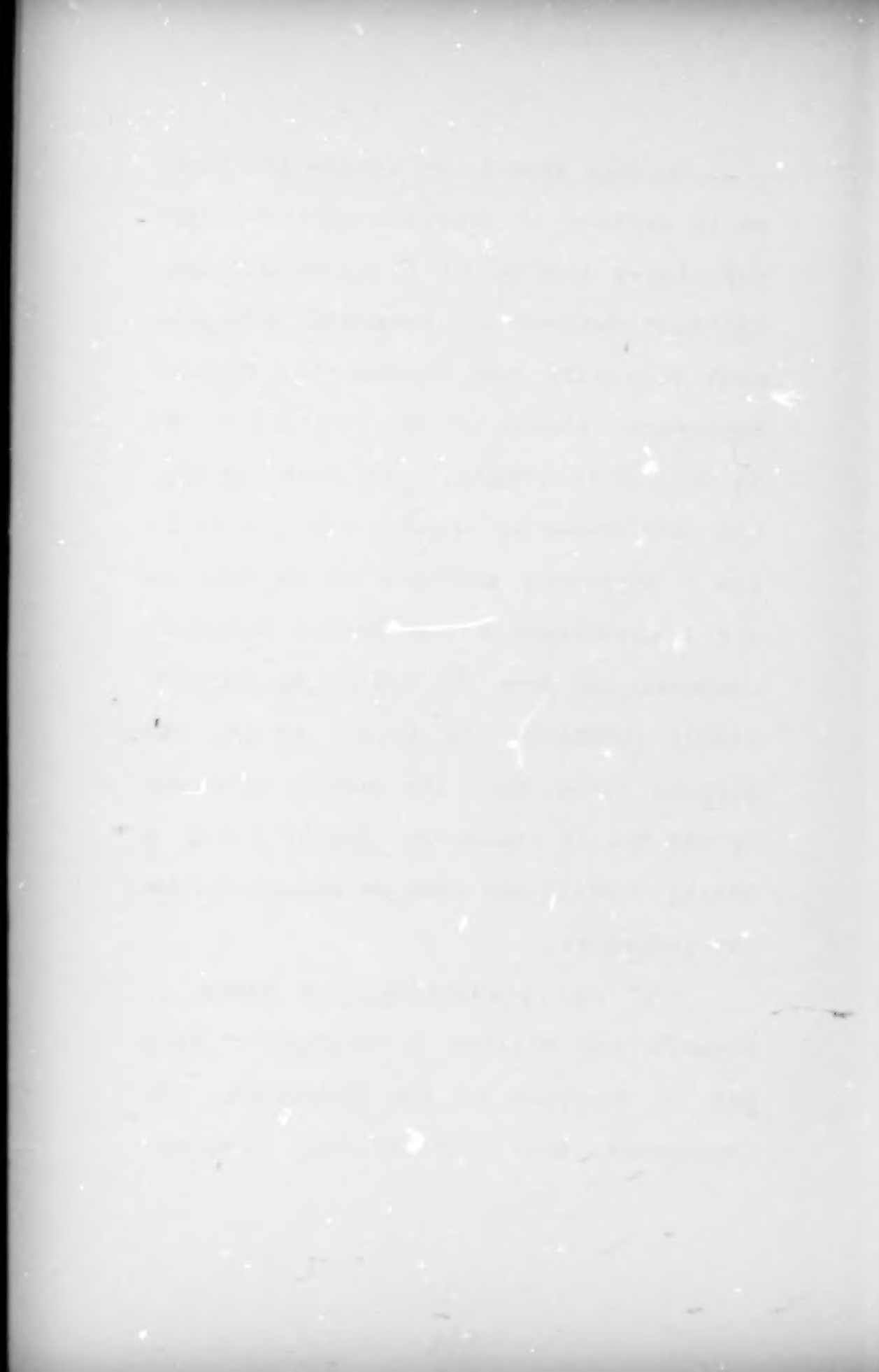
**FROM THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH**

Lester E. Schlitz, Judge



In this appeal, we review two judgments entered in separate actions, each sustaining a plea to the jurisdiction. Claiming damages for personal injuries, each plaintiff had invoked the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982) (FELA). In each appeal, the sole issue is whether the plaintiff was a statutory employee as defined in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982) (LHWCA or the Act). If so, the parties agree that the remedy provided by the Act is exclusive, see 33 U.S.C. § 905(a) (1982), and that we should affirm the judgments.

The two plaintiffs are Nancy J. Schwalb and William C. McGlone. Each was an employee of the defendant, The Chesapeake and Ohio Railway Company.



Although the accidents resulting in the plaintiffs' injuries occurred at different times, the facts in the two cases, insofar as relevant to the issue common to the two appeals, are substantially identical. Each plaintiff was employed as a laborer to perform housekeeping and janitorial services in the offices, shops, bathrooms, and other places situated on the defendant's pier and adjacent property in Newport News. This property is equipped with facilities designed to transfer coal from railroad cars to ships moored at the pier. A "dumper", activated by "trunnion rollers", upends railroad cars and dumps the coal into "hoppers". The coal falls from the hoppers onto conveyor belts that carry it to a "loading tower" from

which it is poured into the hold of a ship.

Coal spilled on the trunnion rollers can cause the dumpers to malfunction. Coal falling and accumulating beneath the conveyor belts eventually may damage the belts and interrupt the loading process. As part of the duties assigned by the defendant, the plaintiffs were required to clear away coal spilled in these areas. Because they were not members of a longshoremen's union, the plaintiffs were forbidden to load that coal onto the conveyor belts. The plaintiff McGlone was clearing away coal beneath a conveyor belt at the time he was injured. The plaintiff Schwalb was injured in a fall as she was walking along a "catwalk" approaching the trunnion rollers.

The parties in both cases agree that the defendant railroad is a statutory employer as defined in the LHWCA, that is, an employer "any of whose employees are employed in maritime employment, in whole or in part". 33 U.S.C. § 902(4) (1982). The plaintiffs' contention is that the trial courts erred in ruling that they were statutory employees as defined in the Act. The plaintiffs rely upon our decision in White v. N. and W. Ry. Co., 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977). Reviewing a judgment based on such a ruling, we applied the Act as amended in 1972, Pub. L. No. 92-576, 86 Stat. 1251, to the facts in White. First enacted in 1927, Pub. L. No. 69-803, 44 Stat. (part 2) 1424, the LHWCA was the first successful

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congressional response to the Supreme Court's decision in Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). There, the Court had ruled that a state worker's compensation act could not constitutionally apply to a longshoreman injured in an accident that had occurred on a gangplank between a pier and a ship. Initially, Congress sought to authorize states to extend their workers' compensation statutes seaward of the Jensen line, but the Court held the state statutes to be unconstitutional delegations of congressional power. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924).

Although the federal Act filled a workers' compensation void, the LHWCA, as originally enacted, provided coverage

only when "disability or death result[ed] from an injury occurring upon the navigable waters of the United States". 33 U.S.C. § 903(a) (1927). Federal compensation coverage stopped at the Jensen line; the Act did not apply to a longshoreman injured at work on a pier, even though engaged in traditional longshoremen's functions. Nacirema Operating Co. v. Johnson, 396 U.S. 212, 218-20 (1969).

The 1972 amendments to the LHWCA moved the Jensen line landward to include areas adjoining navigable waters and "customarily used by an employer in loading, unloading, repairing, or building a vessel". 33 U.S.C. § 903(a) (1982). Yet, Congress did not extend federal coverage to every worker injured in such areas, for it added an amendment

only other possibility is that
the original source of the
information is the same as the
information reported at
the time the act was
perpetrated. It is not
clear from the evidence in this
case whether the information
was obtained from a source
other than the person who
perpetrated the act.

The information in this
case was obtained from a
source who is not a
member of the same
organization as the person
who perpetrated the act.
It is not clear whether
the information was
obtained from a source
who is a member of the
same organization as the
person who perpetrated the
act.

1-1

defining a covered employee as "any person engaged in maritime employment." 33 U.S.C. § 902(3) (1982). The effect of the two amendments was to create a two-pronged coverage test -- the situs of the injury and the status of the injured worker.

In White, a railroad employee filed a claim under FELA. He had been injured on a situs covered by the LHWCA, and "the critical question presented . . . [was] whether plaintiff was a 'person engaged in maritime employment' and thus an 'employee' within the meaning of the Act." 217 Va. at 827, 232 S.E.2d at 809. White was hired as an electrician to maintain and repair the electrical equipment used at a pier to dump coal from railroad cars, to move conveyor belts transporting the coal, and to load

detained a number of employees as well as
and assigned to various positions. The
U.S. of 1941 (1941) was also in
the two companies was in 1941
and assigned a large part of the work
of the company and the result of the
company's work.

In 1941, a railroad employee filed
a claim under the act and was assigned
to a place covered by the act. The
the railroad company's statement.

(see) whether possible was a person
employed in railroad employment and that
an employee under the act of the
act of 1941 was in 1941
while was hired as an employee to
maintain and repair the railroad
equipment and as a result of the
the railroad company. The railroad
with a railroad company and was in 1941

the coal into ships. Although White did not operate any of the equipment employed in the loading process, the railroad argued that "all of his activity was 'functionally related' to the loading of coal on ships", id. at 831, 232 S.E.2d at 812, and that he was, therefore, an employee engaged in maritime employment and, as such, was limited to the remedy provided by the LHWCA.

In White, the railroad had borrowed the "functional relationship" formula from the opinion in Sea-Land Service, Inc. v. Director, Office of Workers' Compensation, 540 F.2d 629, 637-38 (3d Cir. 1976). Considering the history of the Act and construing the congressional intent underlying the 1972 amendments, we rejected that formula. We adopted,

instead, the standard articulated in Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 961 (9th Cir.), cert. denied, 429 U.S. 868 (1976)^{1/}:

[F]or an injured employee to be eligible for federal compensation under [the Act], his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity

1/ The Supreme Court disapproved application of a significant relationship standard to determine the status of the worker in Director, OWCP v. Perini North River Associates, 459 U.S. 297, 302 n.8, 318-19 (1983). The Court did not, however, disapprove a significant relationship standard as a concept when applied, as in Gilmore, to post-1972 coverage landward of the Jensen line. As noted by the majority in Herb's Welding, Inc. v. Gray, 470 U.S. 414, 424 n.10 (1985) (quoting Perini, 459 U.S. at 299, 324 n.34) the decision in Perini "was carefully limited to coverage of an employee 'injured while performing his job upon actual navigable waters' . . . [and] was, 'of course,' limited to workers covered prior to 1972".

involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in § 903.

Applying the Gilmore standard, we said that 'we do not believe plaintiff's duties . . . had a realistically significant relationship to the loading of cargo on ships', that 'plaintiff was not a covered 'employee' within the meaning of the Act', and that 'the order dismissing plaintiff's FELA action will be reversed'. 217 Va. at 832-33, 232 S.E.2d at 813.

In the appeals at bar, the defendant railroad relies on Price v. Norfolk & W. Ry. Co., 618 F.2d 1059 (4th Cir. 1980). There, the plaintiff in an FELA action was a painter employed by the defendant railroad. He sustained an

injury while painting the support towers of a structure housing a conveyor belt system used in loading grain into the hold of a vessel. The Price court reasoned that, because "the failure to paint would eventually lead to severe rusting that would halt the entire [loading] process", id. at 1062 n.4, the plaintiff was engaged in maritime employment and, consequently, "was an 'employee' within the meaning of the LHWCA which provides an exclusive remedy", id. at 1062.

We cannot agree that Congress intended the 1972 amendments to have such pervasive and preclusive effects. Nor do we agree with the argument advanced by the railroad in these appeals that the Supreme Court implicitly has overruled our decision in

White. On brief, the defendant says that "the U.S. Supreme Court has stated that one is engaged in maritime employment if he is 'engaged in the overall process of loading and unloading vessels' (emphasis supplied)." For this proposition, the defendant cites North-east Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). The language the defendant quotes from that decision is an abbreviated excerpt lifted from a longer passage, the import of which we construe differently.

The injuries at issue in Caputo were sustained during the process of unloading a ship. Considering the reports of the congressional committees that initiated the 1972 amendments, the Court concluded that Congress intended

to cover those workers
involved in the essential

elements of unloading a vessel
-- taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truckdrivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered. Also excluded are employees who perform purely clerical tasks and are not engaged in the handling of cargo.

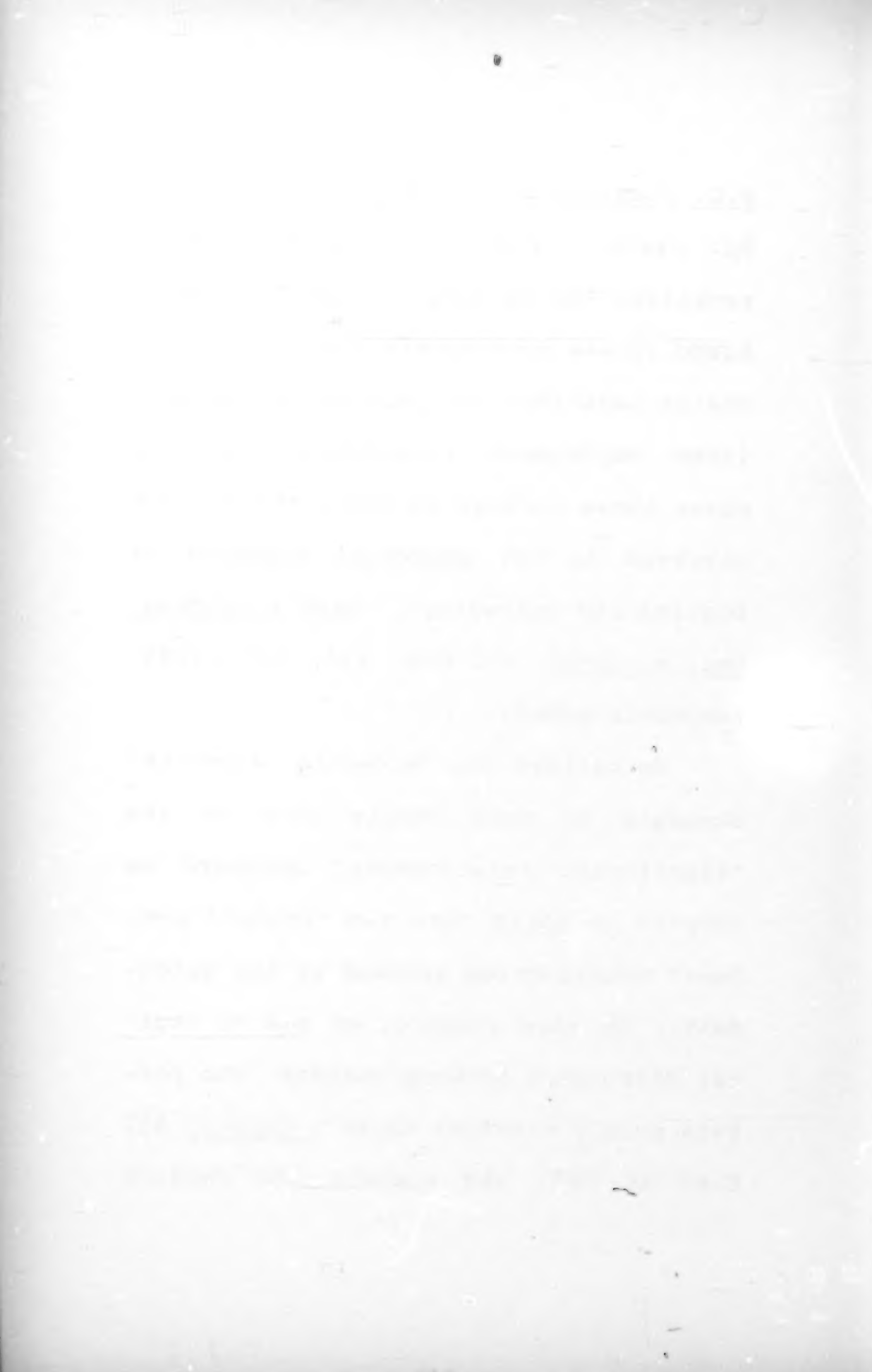
Id. at 267 (emphasis added). As we construe this language, the Court reasoned that, although clerical employees working on a covered situs may have responsibilities related to the commercial process, unless they are "engaged in the handling of cargo", they are not "involved in the essential elements of [loading or] unloading a vessel" and,

therefore, are not statutory employees for purposes of the LHWCA. Id.

We recognize that the Act is remedial in purpose and, as the defendant says, that "Caputo requires an expansive view of LHWCA". We note, however, that the Court speaks of covered workers as those "involved in the essential elements of unloading a vessel", id.; as those "directly involved in the loading or unloading functions", id. at 271 (quoting S. Rep. 1125, 92d Cong., 2d Sess. 13 (1972) and H.R. Rep. 1441, 92d Cong., 2d Sess. 11 (1972)); and as those who "spend at least some of their time in indisputably longshoring operations", id. at 273. Two years following Caputo, the Court said that "workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act."

P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 82 (1979). And the Supreme Court, recalling the language of Caputo, emphasized in its most recent analysis of the status test that the purpose of the maritime employment requirement was "to cover those workers on the situs who are involved in the essential elements of loading and unloading". Herb's Welding, Inc. v. Gray, 470 U.S. 414, 423 (1985) (emphasis added).

We believe the "essential elements" standard is more nearly akin to the "significant relationship" standard we adopted in White than the "overall process" construction invoked by the defendant. In this respect, we see no logical difference between workers "who perform purely clerical tasks", Caputo, 432 U.S. at 267, and workers who perform



purely maintenance tasks, such as painting, or workers who, like the plaintiffs in these appeals, perform purely house-keeping and janitorial tasks.

Applying the rule in White, we hold that the plaintiffs were not statutory employees as defined in the LHWCA. We will reverse the judgments dismissing the plaintiffs' FELA actions and remand the cases for trials on the merits.^{2/}

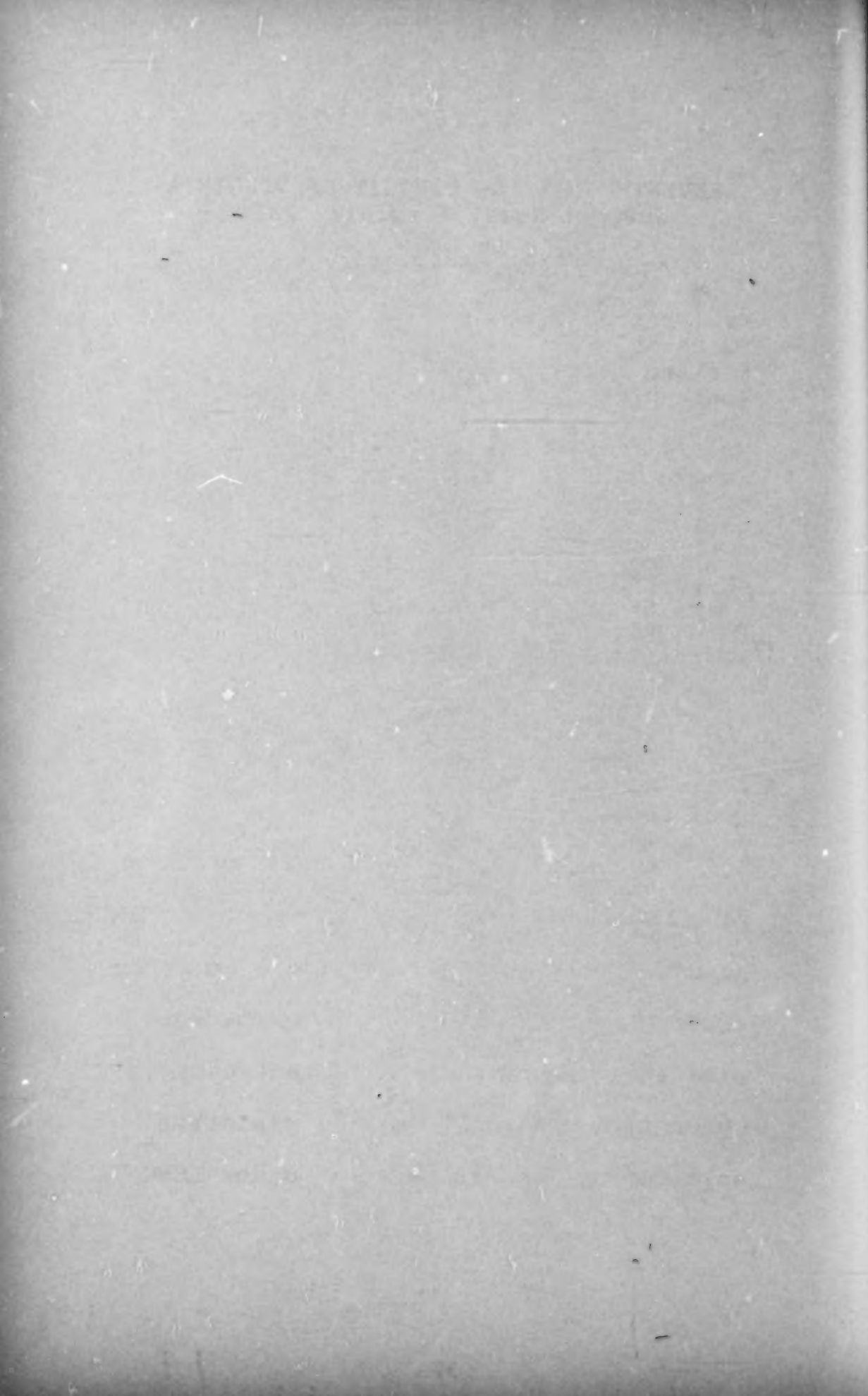
2/ In the Schwalb appeal, the defendant argues that the plaintiff "is estopped from denying LHWCA coverage" because she accepted compensation paid under the Act. According to the defendant's brief, "[s]he expresses no agreement to off-set compensation payments previously received against any recovery under FELA and, therefore, double recovery remains a possibility." But, in a memorandum of law filed in the trial court, we find that the plaintiff acknowledged that "any recovery by

Record No. 841743 - Reversed
and remanded.

Record No. 850728 - Reversed
and remanded.

Footnote continued from previous page.

plaintiff on her FELA claim will be reduced by the amount of LHWCA benefits she may have already received.* A railroad worker who makes such a concession does not seek a double recovery and is not precluded from pursuing a remedy under FELA. Freeman v. Norfolk and Western Ry. Co., 596 F.2d 1205, 1208 (4th Cir. 1979); accord Caldwell v. Ogden Sea Transport, Inc., 618 F.2d 1037, 1049 (4th Cir. 1980).



SEVENTH JUDICIAL CIRCUIT OF VIRGINIA
Newport News, Virginia 23607

August 8, 1984

Ms. Frances S.P. Li
Suite 565
608 2nd Avenue
South Minneapolis, Minnesota 55402

Mr. William W. Nexsen
Stackhouse, Rowe & Smith
P. O. Box 3570
Norfolk, Virginia 23514

Mr. Richard Wright West
West, Stein, West & Smith
P. O. Box 257
Newport News, Virginia 23607

Re: Nancy J. Schwalb v. The
Chesapeake and Ohio Railway
Company At Law No. 8827

Dear Counsel:

You will recall that on June 6, 1984, the Court heard argument on a special plea to jurisdiction in the above captioned cause. This special plea was filed by the defendant C&O, in which they contend that the plaintiff's sole remedy in this cause is under LHWCA

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and consequently this court lacks jurisdiction on the motion for judgment.

The Court heard evidence of witnesses, stipulations by counsel, has read the memorandums of law and cases cited therein and am rendering my decision by this letter.

The plaintiff and defendant both agree that to be covered under LHWCA an injured employee must meet both a situs and a status test, both sides agree that the situs test has been met. This leaves as the only question involved whether or not the plaintiff employee is engaged in maritime employment and the Court holds that the plaintiff Schwalb is so engaged, as her duties were essential to the loading and unloading of coal by conveyor belt to the ships moored at the docks. It is

uncontradicted that if the spilled coal was not removed that it could have haulted the process of loading the coal aboard the vessels. With the liberal interpretations expressed in decisions by the United States Supreme Court this Court has no difficulty in determining that the plaintiff's remedy is under the LHWCA. Therefore, the plea to the jurisdiction is sustained and I am requesting Mr. West to draw the appropriate order, noting plaintiff's exception and objection and having the order endorsed by opposing counsel and returning to the Court for entry.

Very truly yours,

Douglas M. Smith
Judge

THIRD JUDICIAL CIRCUIT

Circuit Court of the City of Portsmouth

May 29, 1985

Richard Wright West, Esquire
P.O. Box 257
Newport News, Virginia 23607

Russell N. Brahm, III, Esquire
P.O. Box 1138
Portsmouth, Virginia 23705-1138

Re: William McGlone v. Chesapeake and
Ohio Railway Co. L84-327

Gentlemen:

Thank you for your excellent
and most exhaustive memoranda. I have
reviewed the pleadings, the evidence and
the argument of counsel, and I have read
the memoranda and all of the cases
cited.

William McGlone, plaintiff,
was injured at Newport News, Virginia,
on February 1, 1983, and filed his

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Motion for Judgment against the Chesapeake and Ohio Railway Company, defendant, on May 31, 1983, under the Federal Employer's Liability Act (FELA), 45 U.S.C. 51, et. seq. Defendant filed a special plea to the jurisdiction on June 24, 1983, on the ground that plaintiff's sole and exclusive remedy upon the matters alleged in the Motion for Judgment is under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(a).

A hearing on the special plea was heard by this Court on March 29, 1985, evidence taken and a transcript prepared. It appears from the evidence that plaintiff and employee of the Chesapeake and Ohio Railway Company on the date of the accident was working on the pier as a laborer cleaning up coal

which had fallen from a conveyor belt which was being used to load coal onto a ship at the pier. The hopper and conveyor belt is an extension of the pier. If coal is not removed in the area where the plaintiff was cleaning up, the coal would eventually interfere with the loading operation and bring it to a halt. This work was frequently done by the plaintiff. Plaintiff was injured by the conveyor belt while engaged in this work. The sole action involved here is whether the plaintiff at the time of his injury was working in a maritime capacity as defined by the LHWCA.

An injured employee must meet both a "situs" and a "status" test in order to be covered under LHWCA. There seems to be no question here that the injured [sic] occurred in a covered

situs but we must determine whether plaintiff occupied a status covered under LHWCA. Noqueira v. New York, N.H., and H.R. Company. 281 U.S. 128, (1930).

The Court must resolve a conflict in the case law between a decision of the Supreme Court of Virginia, White v. Norfolk & Western Railway Co., 217 Va. 823 (1977), cert. denied, 434 U.S. 860 (1977) and Price v. Norfolk & Western Railway Company, 618 F2d 105 (1080) [sic], decided by the Fourth Circuit Court of Appeals. In White the court stated at page 832:

"Plaintiff was not actually handling any cargo either manually or mechanically, as was the case in the decisions principally relied on by N & W. Moreover, plaintiff was not manipulating (except to test) any of the controls of the electrical mechanism, which furnished the power for

this automated loading process. Rather, he was only maintaining the electrical device on the shore and attached to the pier, work which is not the traditional work of a ship's service employee. Plaintiff was at least one step removed from a realistically significant relationship and from a direct involvement with the loading of vessels. The mere fact that some of the plaintiff's cumulative injury was sustained out over the Elizabeth River while he worked inside the electrical rooms of the Pier 6 ship loaders, does not convert his status from that of a railroad electrician to that of a maritime worker."

It can thus be seen that the Virginia Supreme Court held that to qualify as an employee under LHWCA the plaintiff must have been directly involved in the loading of coal. Under this ruling plaintiff could not have been held to be an employee under LHWCA.

Price decided three years after White holds to the contrary.

The Fourth Circuit held that a railway employee who was injured while painting towers used in the loading of ships was an employee under LHWCA. The court held that merely because the employee was not directly involved in the actual loading of ships, this fact did not remove him from coverage under LHWCA because the maintenance of the towers was essential to the movement of maritime cargo and thus the employee was included in the broad concept of maritime employment.

This view has been upheld in many Federal court decisions. See: Newport News Shipbuilding and Drydock Company v. Graham, 573 F2d 167 (4th Circuit), cert. denied, 439 U.S. 979, 99

S.Ct. 563 (1978); Northeast Marine Terminal Company v. Caputo, 432 U.S. 249, 97 S.Ct. 2348 (1977).

It will thus be seen that the Fourth Circuit has adopted a broad concept of maritime employment that maintenance of maritime cargo loading equipment is essential to the loading of cargo and is, therefore, included in the meaning of a person engaged in maritime employment under LHWCA.

White stands alone in contrast to the federal decisions which were decided after the decision in White.

Should this court blindly follow White because it is a State court decision, under the principle of stare decises? To do so would be to interpret a Federal law contrary to all of the decisions of the Federal courts which

have declined to follow White and have disagreed with its results. It is the Court's belief that this conflict between the Supreme Court of Virginia and the Fourth Circuit Court of Appeals must be resolved in favor of the latter decisions of the federal courts and this Court reluctantly and respectfully declines to follow White since it feels the decision in Price is now controlling.

The Court is of the opinion that the plaintiff in this case, under the facts presented, was engaged in activity which made him an employee under the meaning of LHWCA, and that he is precluded from maintaining a FELA action in this case.

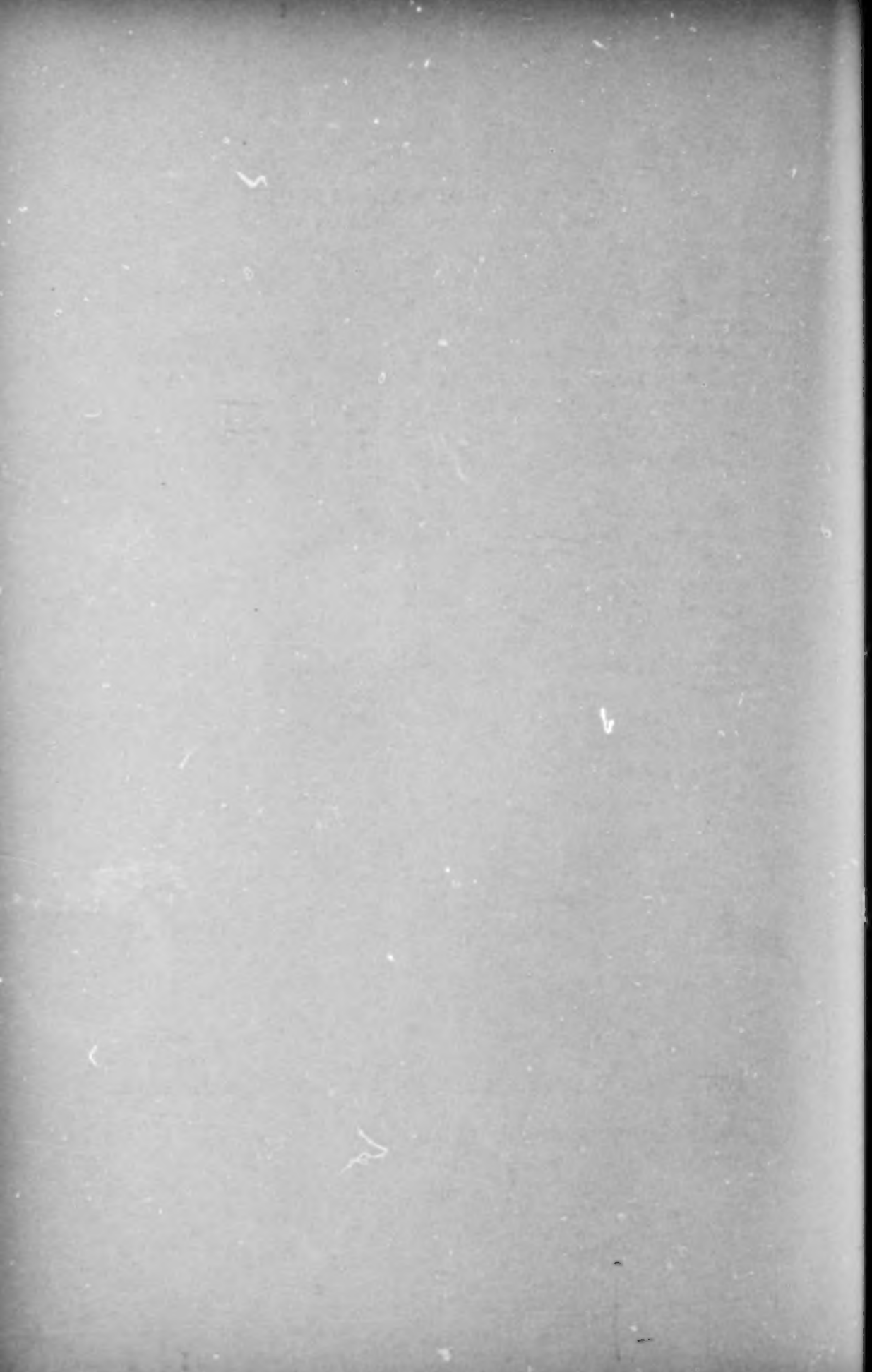
Defendant's special plea to the jurisdiction of this Court is

sustained, and the plaintiff's Motion for Judgment will be dismissed from the docket.

Counsel for the defendant will prepare and circulate a sketch order in accordance with this letter and for presentment to the Court for entry.

Sincerely yours,

Lester E. Schlitz
Chief Judge



SEVENTH JUDICIAL CIRCUIT
Newport News, Virginia
May 21, 1984

Mr. Michael L. Weiner
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2501 Washington Avenue
Newport News, Virginia 23607

Re: Daniel C. Turnista v.
The Chesapeake and Ohio
Railroad Company, a
corporation, Law No. 8690-WS

Gentlemen:

The court has reviewed the plead-
ings and argument, the evidence and the
excellent memoranda.

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Daniel C. Turnista (plaintiff) was injured at Newport News, Virginia on April 19, 1982 and filed his Motion for Judgment against The Chesapeake and Ohio Railroad Company (defendant) on August 25, 1983, under the Federal Employer's Liability Act (FELA), 45 U.S.C. 51, et seq. Defendant filed its Special Plea to Jurisdiction (special plea) on September 15, 1983, asserting that plaintiff's sole and exclusive remedy against it is under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(a). If defendant's contention is valid, then relief under LHWCA is plaintiff's exclusive remedy and the FELA action must be dismissed.

On March 28, 1984 at the time of the hearing on the special plea, the parties stipulated that:

- (1) defendant is an "employer" as defined by 33 U.S.C. 902(4) of LHWCA at the time of plaintiff's accident;
- (2) that plaintiff was then and there employed by defendant; and
- (3) that the injuries of which plaintiff complains occurred "upon the navigable waters of the United States" as defined by U.S.C. §903(a) of LHWCA.

The sole issue is whether the plaintiff at the time of his injuries was a person engaged in maritime employment as defined by 33 U.S.C. §902(3) of LHWCA.

The facts are not in contention. The evidence disclosed that plaintiff, a machinist, was injured in a fall onto a barge while burning shackles loose with

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an acetylene torch as a part of the work required to replace the hood of the offshore coal loading tower on the south side of Pier 14. As a machinist in the mechanical department of defendant, plaintiff spent 50% or more of his working time between the coal loading dumper and the end of the piers, and, otherwise worked in a shop located between the dumper and Pier 14, primarily performing repair and maintenance on coal loading equipment.

The evidence further disclosed that in proceedings pending before U.S. Department of Labor, Office of Workers' Compensation Programs, defendant had paid plaintiff under LHWCA (as of time of hearing), compensation payments aggregating in excess of \$29,500.00, and, that plaintiff (though disputing

an investigation as a part of the work
conducted to improve the health of the
people and to bring about the most
efficient use of the land. It is a
fundamental principle of the Government
that the land should be used for the
benefit of the people and that the
Government should see that the land is
used in the most efficient manner.
The Government should see that the land
is used in the most efficient manner
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defendant's computation of weekly wage and length of disability) had not challenged coverage under said Act for injuries received on April 19, 1982.

Resolution of this issue comes down to whether the court is required to follow a decision of the Virginia Supreme Court rendered in 1977 or one of the United States Court of Appeals, Fourth Circuit rendered in 1980.

In a unanimous opinion of the United States Supreme Court in Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 268, 97 L. Ed. 2d 320, 335 (argued April 18, 1977; decided June 17, 1977), Justice Marshall stated:

****The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation. The Act 'must be liberally

between a number of the people who
and placed of themselves, but not
imposed upon them, and not for
the purpose of the 11th, 1885.

Section 1 of the 11th, 1885, says
to extend the right to be enjoyed by
the people of the State of New York
and to extend to 1885 as one of the
first steps taken to extend the
right to be enjoyed by the people of the
State of New York in 1885.

Section 2 of the 11th, 1885, says
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people of the State of New York in 1885
to extend to 1885 as one of the
first steps taken to extend the
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Section 3 of the 11th, 1885, says
to extend the right to be enjoyed by the
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to extend to 1885 as one of the
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right to be enjoyed by the people of the
State of New York in 1885.

construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' Voris v. Eikel, 346 US 328, 333, 98 L Ed 5, 74 S. Ct. 88 (1953).****

The Virginia Supreme Court decision in White v. Norfolk and Western Railway Company, 217 Va. 823, 232 S.E. 2d 801 (1977), cert. denied 434 U.S. 860 (1977) was rendered on March 4, 1977 and held that White was not a covered "employee" within the meaning of the Act, saying at page 832:

"Applying the section 2(3) language defining 'employee' in the light of what we perceive to have been Congress' purpose when the 1972 Amendments were adopted, we do not believe plaintiff's duties, in the electrical rooms where the injury allegedly occurred, had a realistically significant relationship to the (833) loading of cargo on ships. Stated differently, when plaintiff was injured he was not directly involved in the loading of coal. See Jacksonville Shipyards, Inc.

v. Perdue, supra, 539 F.2d at 539.

"Plaintiff was not actually handling any cargo, either manually or mechanically, as was the case in the decisions principally relied on by N&W. Moreover, plaintiff was not manipulating (except to test) any of the controls of the electrical mechanism, which furnished the power for this automated loading process. Rather, he was only maintaining the electrical devices on the shore and attached to the pier, work which is not the traditional work of a ship's service employee. Plaintiff was at least one step removed from a realistically significant relationship and from a direct involvement with the loading of vessels. The mere fact some of plaintiff's cumulative injury was sustained out over the Elizabeth River, while he worked inside the electrical rooms of the Pier 6 shiploaders, does not convert his status from that of a railroad electrician to that of a maritime worker.

Thus, the Virginia Supreme Court (in opinion rendered by five justices), in

effect, narrowly held that to be an "employee", the plaintiff must have been directly involved in the loading of the coal (emphasis supplied).

In Price v. Norfolk and Western Railway Company, 618 F.2d 105 (1980), the Fourth Circuit held that a railroad employee injured while painting support towers for the gallery used for conveying grain (loading and unloading ships and barges and not for storage) as a part of routine maintenance for which Norfolk and Western was responsible was "an employee" within the meaning of LHWCA (33 U.S.C. §902(3)). In concluding (page 1062) that "****The Gallery involved here is just as essential to the actual loading and unloading of ships as the machine involved in Graham was to their building****", the opinion

reviewed applicable decisions since
Northeast Marine Terminal, at page
1061:

"We feel that our decision in Newport News Shipbuilding & Drydock Co. v. Graham, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979, 99 S.Ct. 563, 58 L.Ed.2d 649 (1978), is controlling in this case and requires that we reverse the district court's holding that Price was not an employee within the meaning of the Act and therefore was entitled to recover under the FELA. In Graham, a claimant Jones was seeking compensation under the LHWCA for injuries sustained when he bumped against a machine which he was oiling. The machine was used in building ships. He was rated as a mechanic and belonged to the maintenance department of the employer. In holding that Jones was entitled to compensation under the LHWCA, we stated: 'Because Jone's maintenance was essential to keeping the shipyard's machinery in working order for the construction of ships, we conclude that he was a ship-builder within the meaning of the Act.' Id. at 170.

"In so holding, we cited with approval a Benefits Review Board decision that is directly on point. In Bradshaw v. McCarthy, 3 BRBS 195 (1976), petition for review denied, 547 F.2d 1161 (3d Cir. 1977), a mechanic injured his back in a terminal while removing a tire from a forklift he was repairing. The forklift was used to unload ships and to load freight cars, tractors, and trailers. In holding that the claimant was an employee as defined in the Act, the Board stated:

Merely because a waterfront mechanic is not directly involved in the actual loading or unloading of cargo does not remove him from the coverage of the amended Act. The maintenance and repair of longshoring machinery equipment is essential to the movement of maritime cargo and, thus, such an employee's duties are included in the broad concept of maritime employment.

Id. at 198. We can discern no significant distinction between

On the morning of the 1st of
the month of January, 1900,
the vessel "Albatross" left
the port of New York, and
proceeded on her voyage to
the port of San Francisco.
The vessel was commanded by
Lieutenant J. D. Sigsbee,
and carried a crew of 100
men. The vessel was
owned by the U. S. Navy,
and was used for the purpose
of conducting scientific
research.

The vessel was
commanded by
Lieutenant J. D. Sigsbee,
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owned by the U. S. Navy,
and was used for the purpose
of conducting scientific
research.

the repair of machinery essential to the movement of maritime cargo and the painting of a structure essential to the loading and unloading of the same. Nor can we discern any significant distinction between oiling a machine used in building ships, as was the claimant in Graham, and painting a structure used in loading and unloading ships. There is no doubt that employees employed in 'taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area' are "employee(s)" within the meaning of the amended statute. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 267, 97 S.Ct. 2348, 2359, 53 L.Ed.2d 320 (1977). The holding in Graham that a maintainer of a shipbuilder's machinery is covered requires a holding here that a maintainer of a longshoreman's machinery be covered.

"We find no merit in the argument of plaintiff that the fact that the plaintiff was (1062) merely painting the structure housing the conveyor mechanism that transports the grain, rather than the mechanism itself, is sufficient to distinguish this case from

Graham and Bradshaw. The Gallery involved here is just as essential to the actual loading and unloading of ships as the machine involved in Graham was to their building. We should add at this point that we also find persuasive the direction of Northeast Marine Terminal that we take an 'expansive view' of this 'remedial legislation'. 432 U.S. at 268, 97 S.Ct. at 2359.

It is apparent that the Fourth Circuit has adopted the expansive view that "maintenance and repair of longshoring machinery and equipment is essential to the movement of maritime cargo and, thus, such an employee's duties are included in the broad concept of maritime employment." Since Northeast Marine Terminal, the federal courts have consistently applied the "expansive view" in interpreting the meaning of a "person engaged in maritime employment" as that term is used in 33 U.S.C.

§ 902(3) of LHWCA, and, it appears no court has followed White.

Is White nevertheless binding upon this court under the principal of stare decises? Neither Graham (decided March 13, 1978) nor Price (decided April 9, 1980) followed White, the latter expressly declining so to do saying ((sic) at page 1062, "****and with respect simply disagree with White." There is no suggestion in any of the memoranda that the precise question is now before the United States Supreme Court.

With Northeast Marine Terminal and its progeny Graham and Price binding on the Federal district courts, for this court to follow White would further frustrate lack of uniformity between federal and state court decisions

governing the interpretation of the meaning of a federal statute (particularly affecting the Hampton Roads area where ship construction and repair, shipping and longshoring activities are common place), a result the court concludes is not intended by White in view of the subsequent decisions in Graham and Price. The court respectfully declines to follow White, concluding that Price is controlling.

The court is of the opinion that at the time of his injury, plaintiff was engaged in maritime employment, and, thus was an "employee" within the meaning of 33 U.S.C. § 902(3) of LHWCA and that his exclusive remedy against defendant is under LHWCA.

Accordingly, the court concludes that plaintiff is precluded from

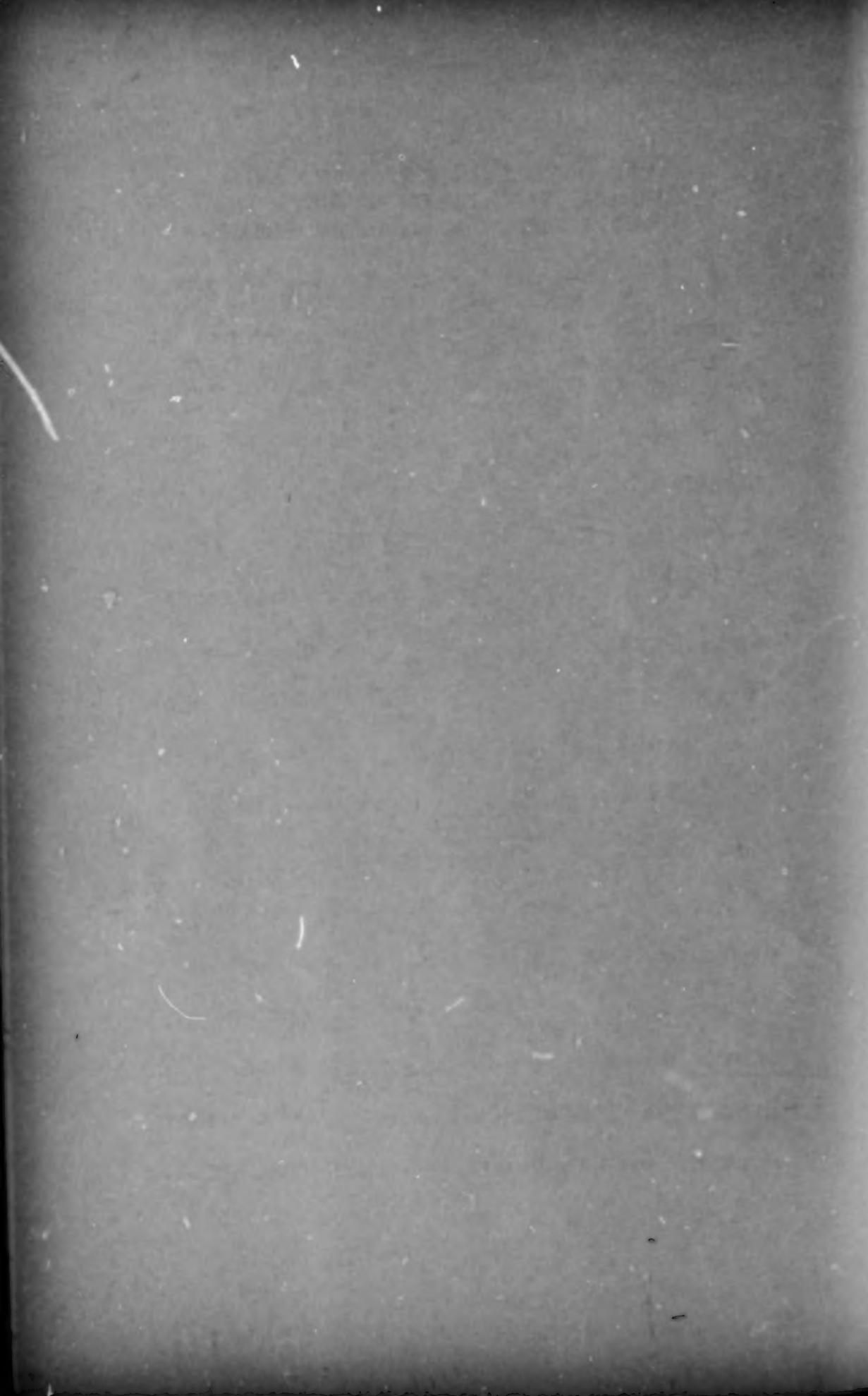
maintaining subject FELA action and that defendant's special plea is sustained and the action of plaintiff is dismissed from the docket with prejudice to plaintiff.

Having so concluded, it is not necessary to reach the issue of what, if any, effect plaintiff's acceptance of compensation payments from defendant under LHWCA has on his right to maintain the FELA action.

Counsel for defendant is required to prepare an appropriate sketch for order sustaining the special plea for the reasons set forth in the foregoing letter opinion and dismissing the action from the docket with prejudice to plaintiff, circulate same to counsel for plaintiff for endorsement, and, to the court for consideration and entry.

Very truly yours,

/s/ J. Warren Stephens
Judge



THE UNCERTAINTY CREATED BY
THE DECISION BELOW RESULTS IN
SIGNIFICANT PRACTICAL PROBLEMS

The decision of the Virginia Supreme Court, since it is in conflict with the federal circuits, including the very Circuit in which it is located--the Fourth Circuit, produces an uncertainty as to whether the claim of a railroad worker injured in connection with shiploading activities ultimately will be held subject to LHWCA or FELA coverage. This uncertainty, in turn, creates a number of practical problems for all concerned with the claim.

At the very outset, both the employee and the employer must make a decision as to whether to file the statutory notices required by the LHWCA (33 U.S.C. §§ 912 and 930), whereas no such notices are required under the FELA.

Then the question arises as to the scope of the investigation into the circumstances of the accident, since the LHWCA requires only that the employee be injured during the course and scope of his employment, whereas under FELA the investigation is necessarily more extensive since it involves questions of the railroad's negligence and the employee's contributory negligence because of the comparative negligence concept incorporated into the FELA (45 U.S.C. §§ 51 and 53). Even the ability of the parties to obtain doctors, for purposes of either examination or treatment, is affected because many physicians will not make their services available if there is a likelihood they will have to testify in court (under the FELA, in a jury trial). They tend to be more cooperative in

LHWCA claims, where their written reports are sufficient, introduced under the relaxed rules of evidence prescribed by 33 U.S.C § 923, or they may testify by deposition without having to physically be present at the hearing. See, Avondale Shipyards, Inc. v. Vinson, 623 F.2d 1117 (5th Cir. 1980).

The railroad is then faced with the problem of whether to secure compensation benefits for the injured employee as required under the LHWCA, which imposes penalties for failure to do so (33 U.S.C. § 914). By contrast, under the FELA, interim disability or unemployment benefits are obtained by the employee from the Railroad Retirement Board (45 U.S.C. § 351, et seq.) and not from the railroad. If the employee recovers under the FELA, there

which is the only one of its kind in the world.

The building is situated in the heart of the city.

It is a fine example of the architecture of the period.

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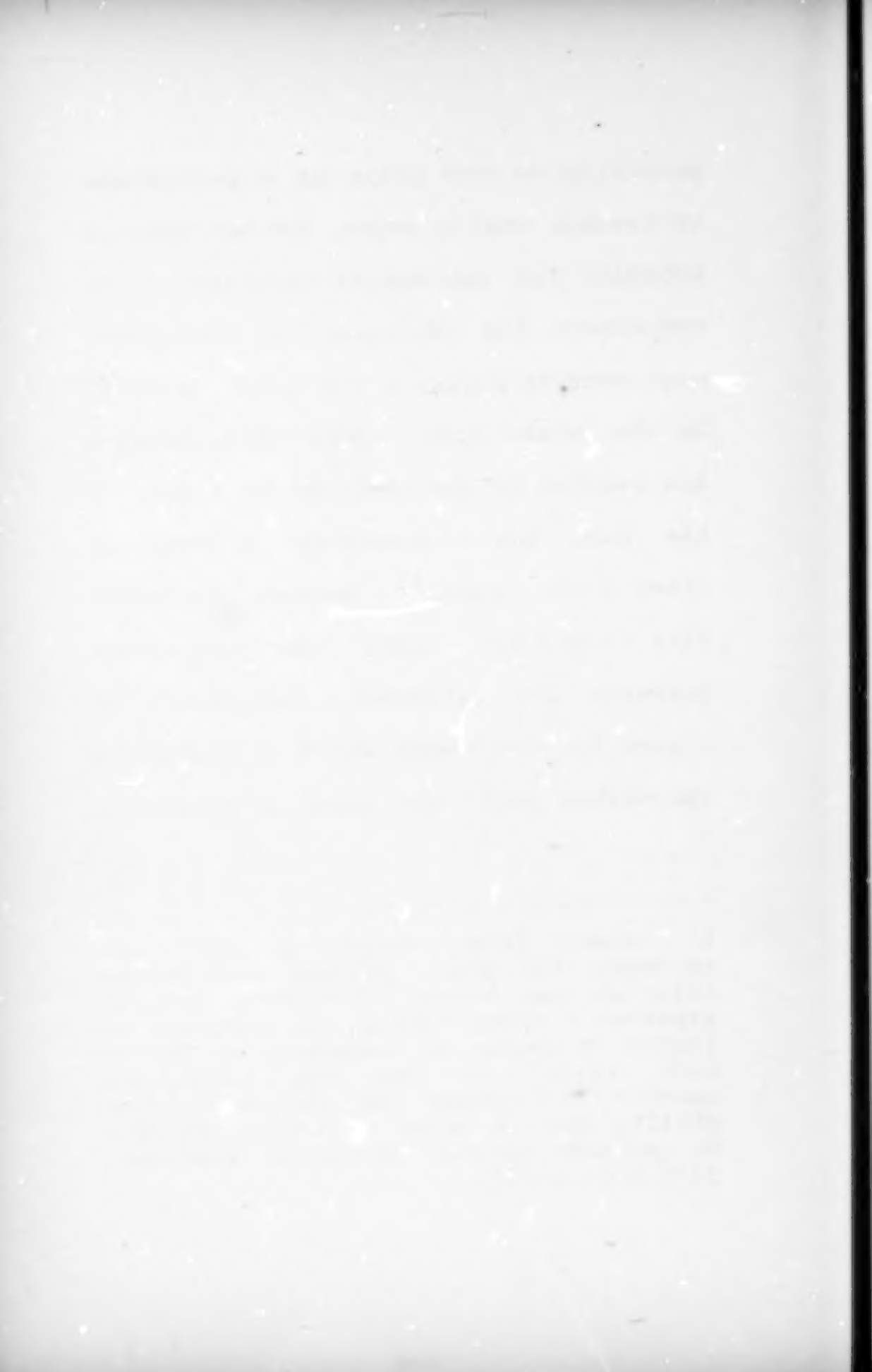
is a statutory lien on his recovery for the amounts paid by the Board. 45 U.S.C. § 362(o).

There are many other practical difficulties which emanate from the uncertainty created by the decision below. Without listing them in detail,^{3/} these difficulties pale by comparison with the major difficulty -- the practical inability to conclude a settlement of the claim due to the totally different schemes of compensation contemplated by LHWCA and the FELA. Under LHWCA, compensation is awarded

3/ These include items which appear to have limited legal significance, but which have great consequence for the injured employee. For example, under LHWCA, the employee must continue treatment by his original physician unless the employer consents to a change (20 C.F.R. § 702.406), whereas under FELA he may go to any physician of his choice.

generally on the basis of a percentage of average weekly wages, either under a schedule for enumerated injuries or to compensate the employee for diminished wage-earning capacity (33 U.S.C. § 908). On the other hand, under FELA damages are awarded to the employee by a jury on the same basis generally allowed in other civil cases.^{4/} Because the benefits available under the respective statutes are different, resolution of claims by settlement would be virtually impossible until the final adjudication

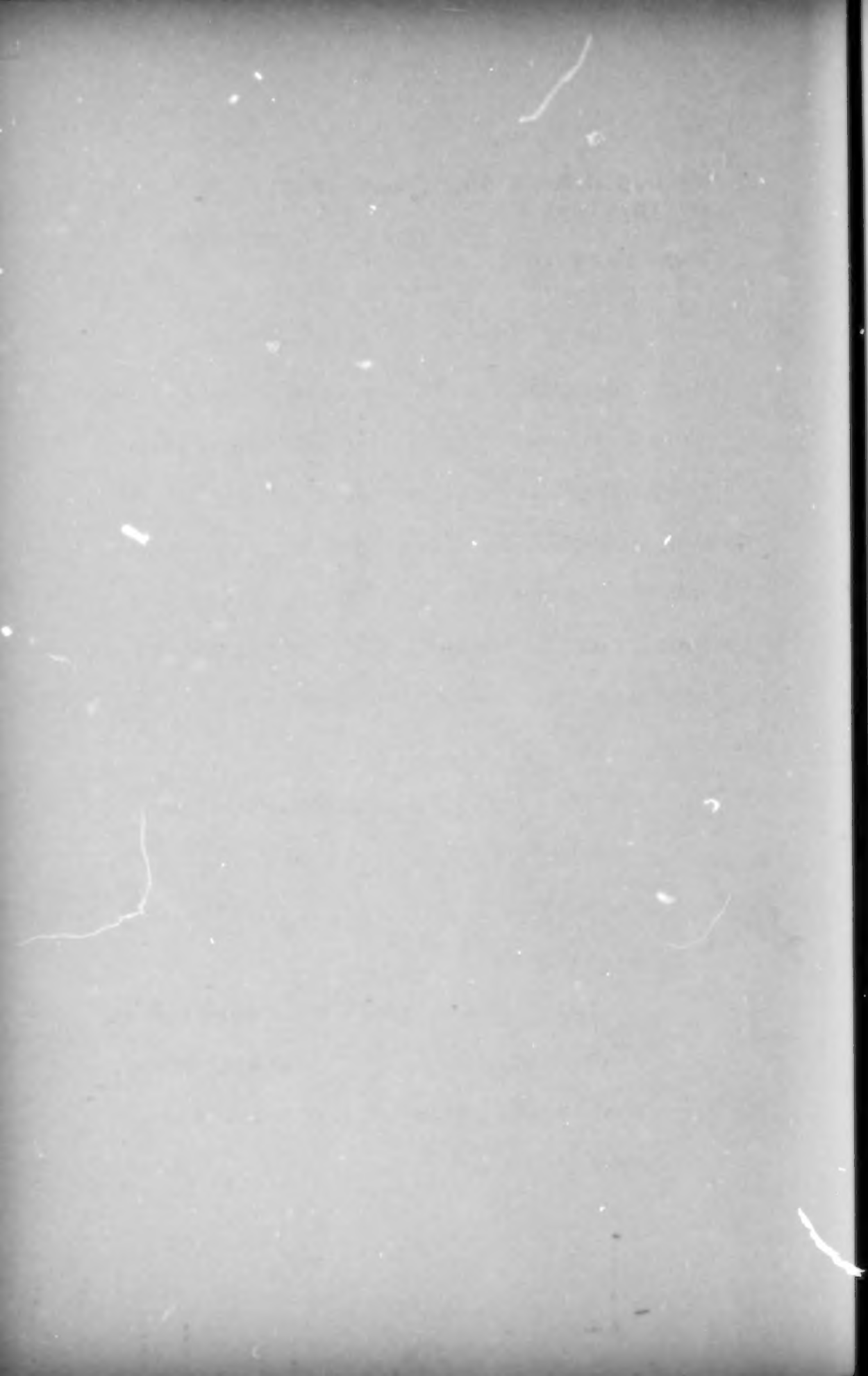
4/ Under FELA, there is only one recovery for past, present and future injuries and losses, including medical expenses. Under LHWCA, the employer is liable in cases of temporary or permanent injury to pay the prescribed amounts throughout the period of disability and is under a continuing duty to provide medical attention therefor. 33 U.S.C. § 907.



of the question as to which of the statutes applies,^{5/} necessitating that the case be filed in the courts for a final resolution.

Thus the uncertainty created by the decision below not only generates many difficulties for the employee, the railroad, and their respective attorneys, but also serves to burden the courts with yet additional litigation.

5/ Even assuming arguendo that the parties were able to agree upon a settlement, that would not necessarily put the problem to rest because of the "Catch-22" situation created by the two statutes. The LHWCA renders invalid any agreement waiving compensation under the Act (33 U.S.C. § 915(b)), and an employer's liability is not discharged unless the settlement is approved by the Commission (33 U.S.C. § 908(i)(1)). The FELA similarly precludes any contract or device by which the carrier exempts itself from liability under that Act. (45 U.S.C. § 55).



33 U.S.C.A. § 902 (West 1986).
Definitions

When used in this chapter--

* * * * *

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include --

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

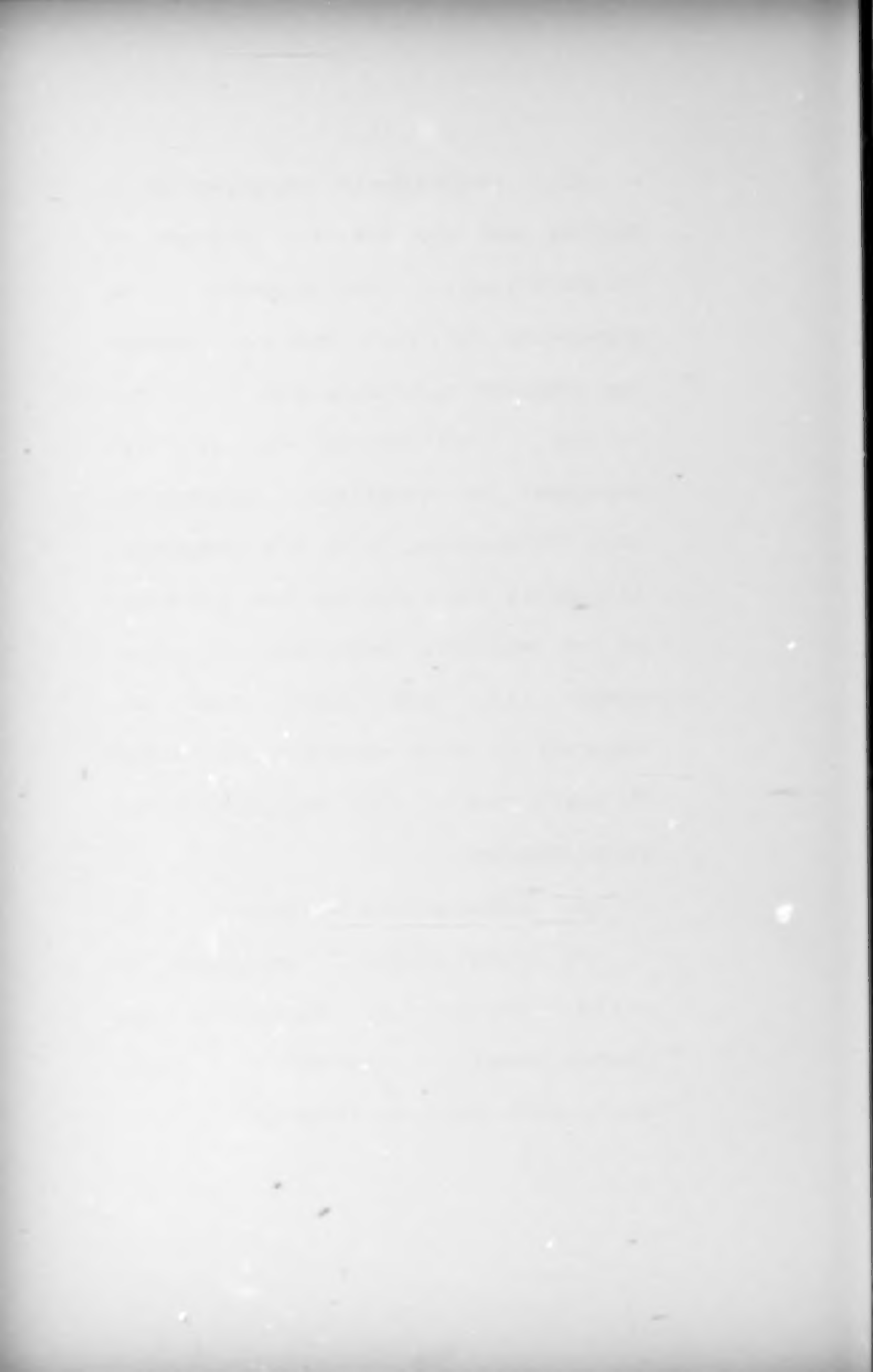


(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

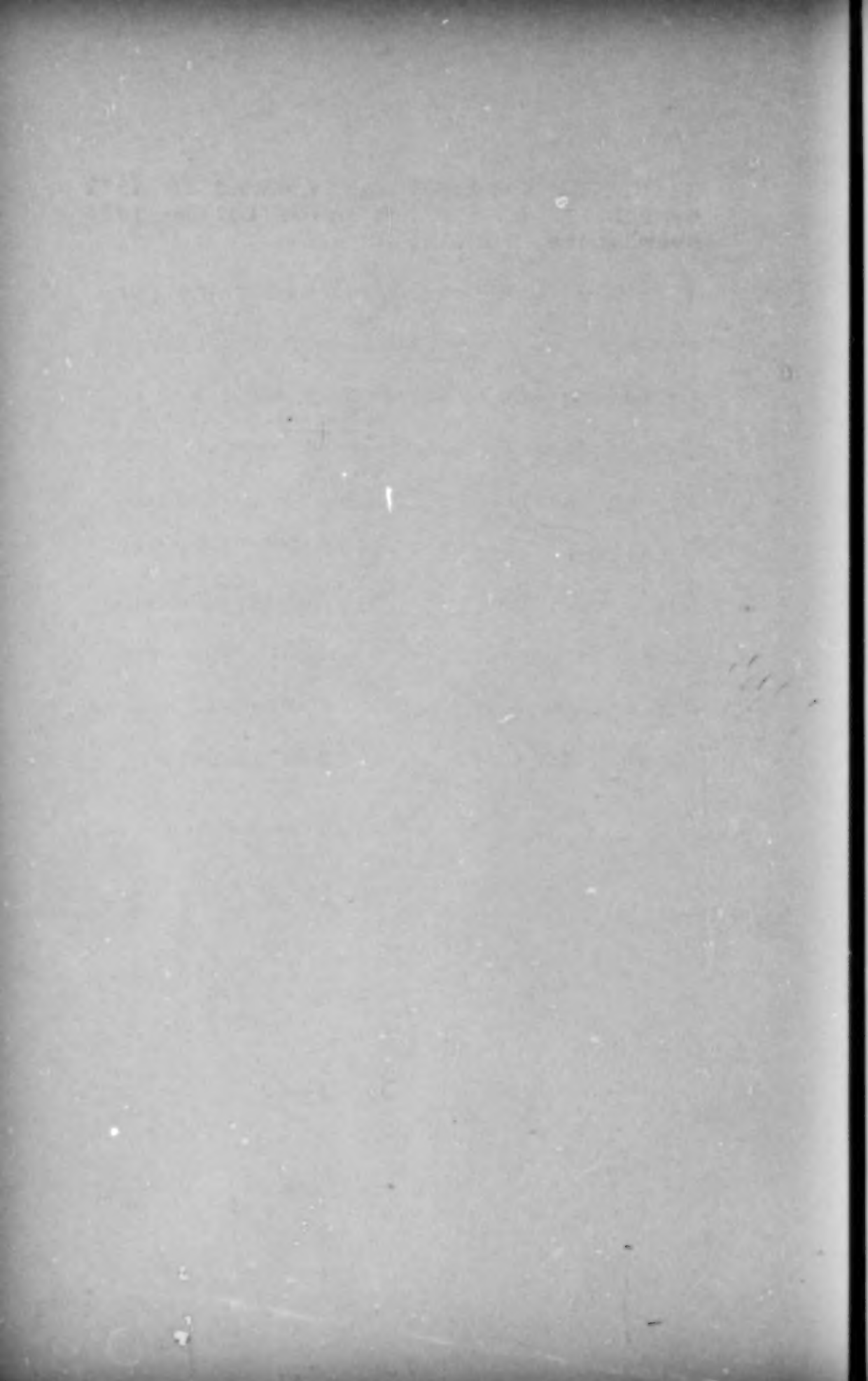
(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;



(G) a master or member of a crew of any vessel; or

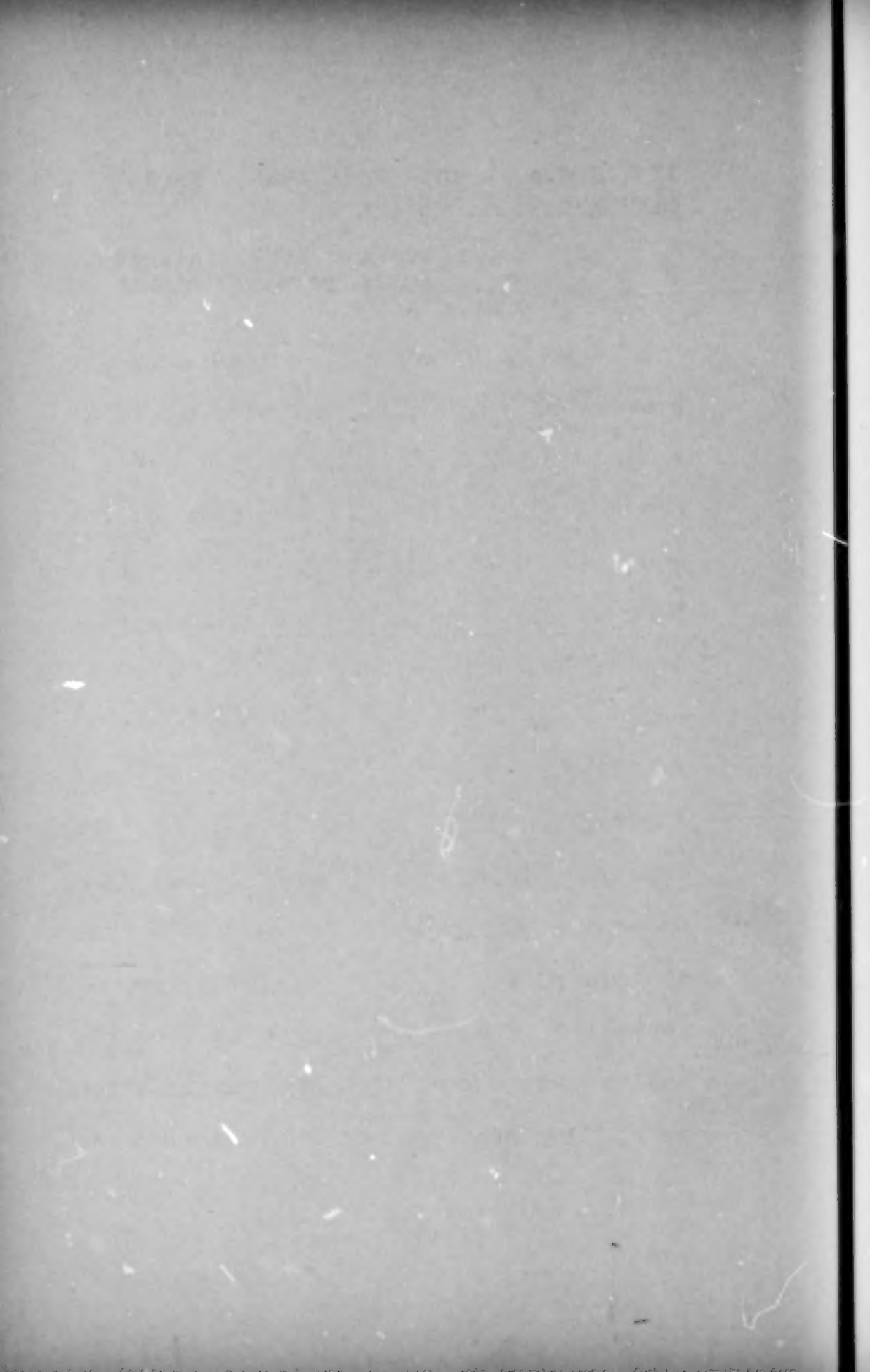
(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.



33 U.S.C. § 902(3) (as amended in 1972 by Pub. L. 92-576 but prior to the 1984 Amendments, Pub. L. 98-426)

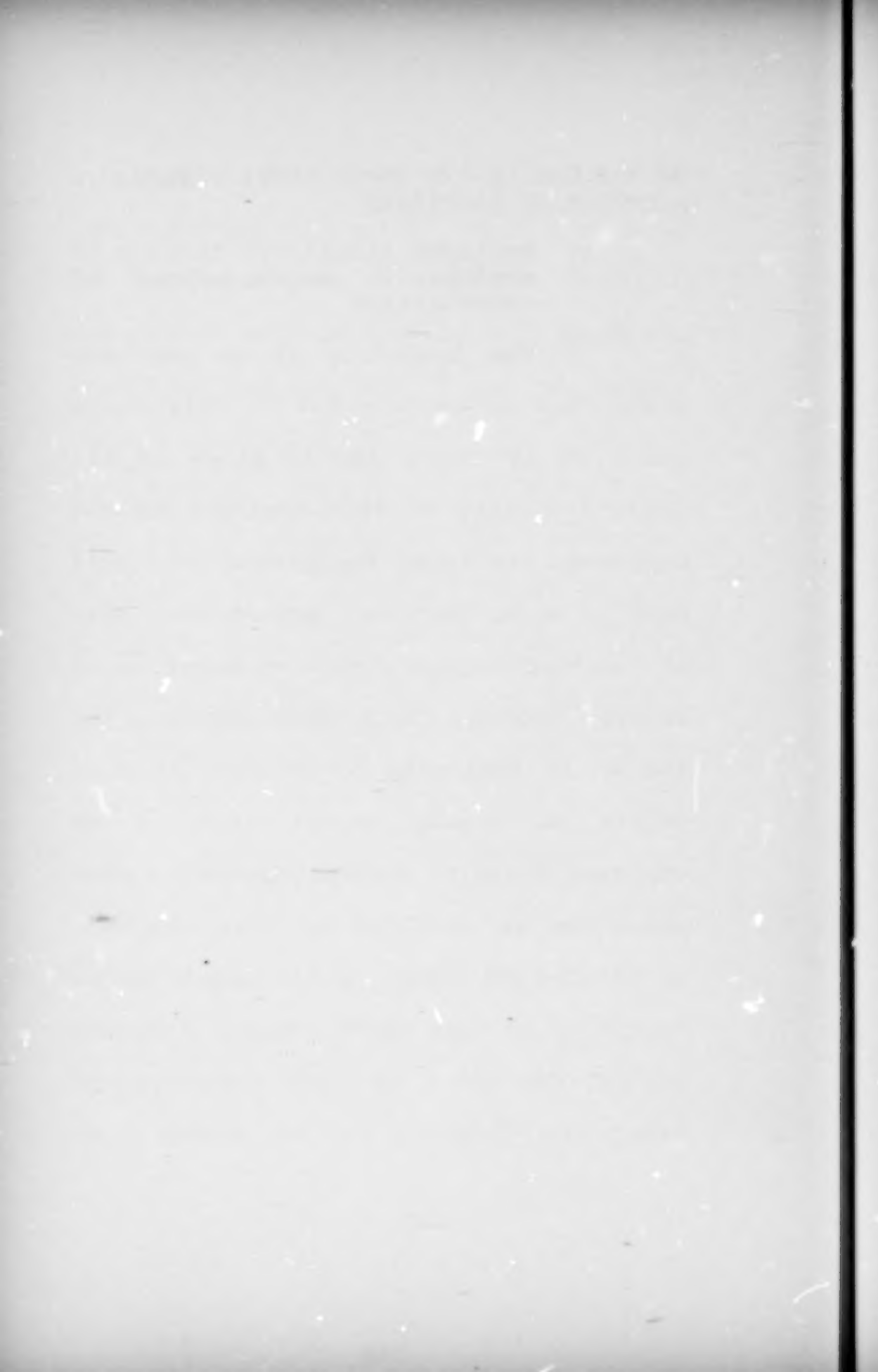
The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.



33 U.S.C.A. § 905 (West 1986). Exclusiveness of liability

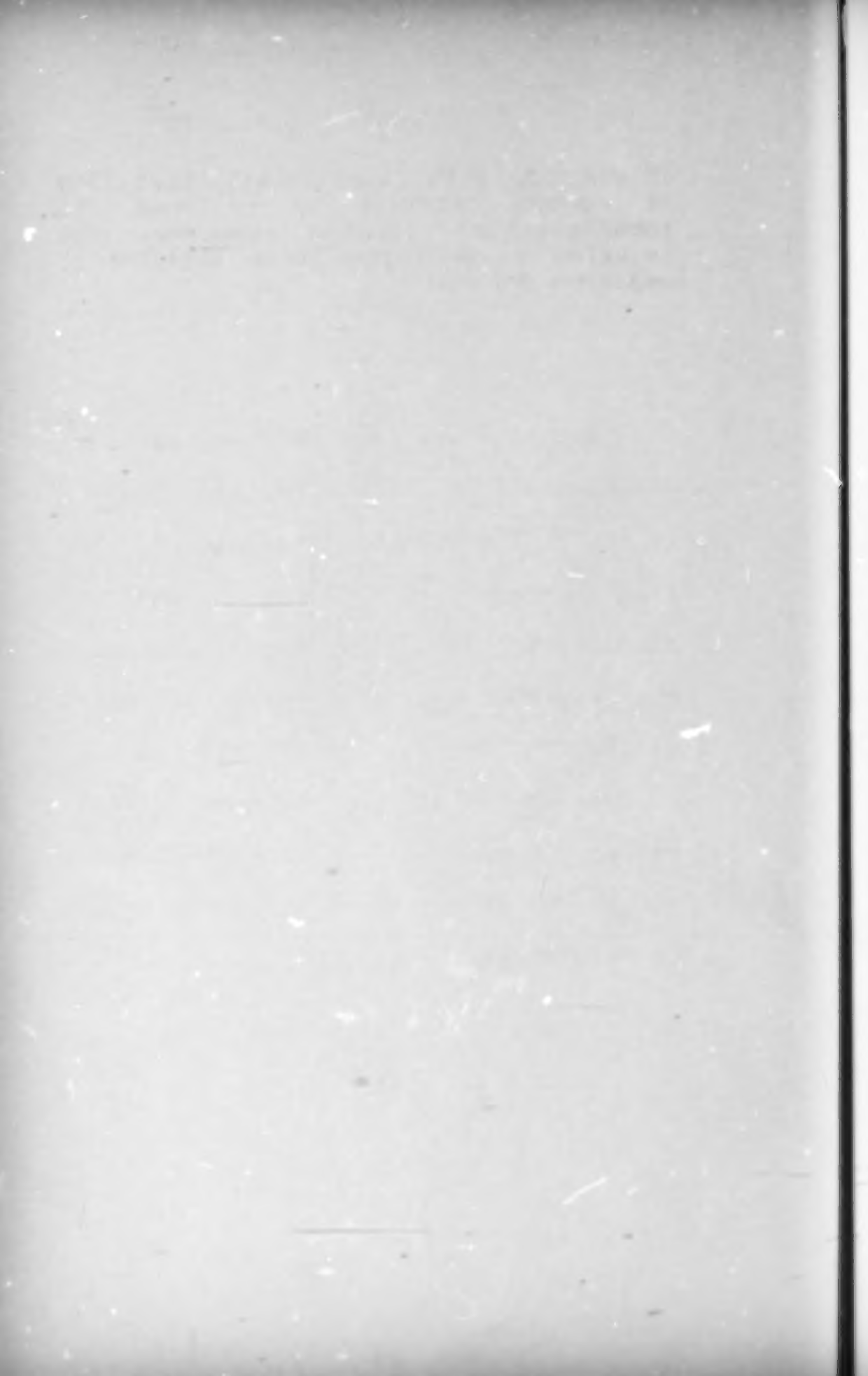
- (a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an



action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

* * * * *



45 U.S.C.A. § 51 (West 1986). Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

* * * * *

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(2)

Docket No. 88-127

Supreme Court, U.S.

FILED

AUG 18 1988

CLERK

In the Supreme Court of the United States

October Term, 1987

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

ROBERT T. GOODE, JR.,
Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA**

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QUESTIONS PRESENTED

I. Whether a railroad worker who was injured while repairing railroad equipment used for braking and stopping hopper cars and who does not perform traditional longshoring activities, is a "maritime employee" under the Longshoremen's and Harbor Workers' Compensation Act?

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1. Excerpt from Discovery
Deposition of Robert T.
Goode taken June 17, 1906,
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trial on merits

1A

2. Affidavit of Robert T.
Goode, entered as Exhibit
D-2 in trial on merits

2A

3. Affidavit of Edward D.
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22 U.S.C. Sec. 551, 552

Longshoremen's and Harbor Workers' Compensation Act
33 U.S.C. Sec. 901, 902

22 U.S.C. Sec. 553(a)

22 U.S.C. Sec. 553(a)

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1987

No. 88-127

NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner,

v.

ROBERT T. GOODE, JR.,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA**

Respondent, Robert T. Goode, Jr.,
respectfully prays the Petition for a
Writ of Certiorari of Norfolk & Western
Railway Company be denied.

STATUTES INVOLVED

This case requires interpretation
of provisions of the Longshoremen's and
Harbor Workers' Compensation Act

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 95-137

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent,

vs.

ROBERT T. COOKE, JR.,

Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS
TO THE SUPREME COURT OF VIRGINIA

Respondent, Robert T. Cooke, Jr.,

respectfully prays the Petition for a

Writ of Certiorari of Norfolk & Western

Railway Company be denied.

WITNESSES MY HAND

This case requires investigation

of provisions of the Interstate Commerce Act

and the Interstate Commerce Commission Act

("LHWCA"), 33 U.S.C. Section 902(3), and also involves the Federal Employer's Liability Act ("FELA"), 45 U.S.C. Sections 51-60. The relevant portions of these Acts are reprinted in the Appendix to the Petition.

STATEMENT OF THE CASE

The Respondent Robert T. Goode, Jr. ("Goode") filed suit under the Federal Employers Liability Act ("FELA") against the Petitioner Norfolk & Western Railway Company ("Railroad") in the Circuit Court for the City of Norfolk, for injuries sustained on February 11, 1985, while performing maintenance on a retarder at the Railroad's Lamberts Point Yard in Norfolk, Virginia. The injury resulted in the loss of an index finger and permanent damage to another finger as

and
also involves the Federal Employees
Liability Act (FELA), 45 U.S.C.
Sections 51-60. The relevant portions of
these Acts are reprinted in the appendix
to the Petition.

STATEMENT OF THE CASE

The Respondent Robert T. Goode, Jr.
("Goode") filed suit under the Federal
Employees Liability Act (FELA) against
the petitioner Norfolk & Western Railway
Company ("Norfolk") in the Circuit Court
for the City of Norfolk, for damages
sustained on February 11, 1982, while
performing maintenance as a railroad
car inspector's assistant. The injury resulted
in the loss of an index finger and
permanent damage to another finger as

well as to the hand. Goode was unable to work in his occupation as a machinist from the date of the accident to August 1, 1985.

The Railroad moved to dismiss the suit contending that the Longshoremen's Harbor Workers' Compensation Act ("LHWCA") was Goode's exclusive remedy for his injuries. On November 13, 1986, Judge Charles R. Waters, II, of the Circuit Court of the City of Norfolk issued a letter opinion dismissing the suit holding that the LHWCA provided Goode's exclusive remedy. An Order to this effect was entered by the Court on December 17, 1986. Copies of Judge Water's letter and the Order are reprinted in the Appendix to the Petition.

well as to the hand. Goode was unable to
work in his occupation as a machinist
from the date of the accident to August
1, 1934.

The Railroad moved to dismiss the
bill contending that the longshoreman's
negligence was the cause of the accident. A
"summary judgment" was granted to Goode's
exclusive remedy. On November 17, 1934,
Judge Charles R. Williams, Jr. of the
District Court of the City of New York
rendered a decision granting the
bill holding that the LMRCA provided
Goode's exclusive remedy. An order to
this effect was entered by the Court on
November 17, 1934. Copies of Judge
Williams' letter and the order are
attached to the Appendix in the
enclosure.

The Supreme Court of Virginia granted an appeal and on April 22, 1988 issued a decree reversing the decision of the Circuit Court and remanding the case for a trial on the FELA claim. The Supreme Court of Virginia did not render an opinion in this action but simply cited in the decree its opinion in Schwalb v. Chesapeake & Ohio Railway Co., 235 Va. 27, 365 S.E.2d 742 (1988), decided on March 4, 1988. A copy of the Decree of April 22, 1988 is reprinted in the Appendix to the Petition. The Railroad is seeking review in this Court of the decision of the Supreme Court of Virginia.

The facts relevant to the issue are as follows:

The Supreme Court of Virginia
granted an appeal and on April 24, 1932
issued a decision reversing the decision of
the Circuit Court and remanding the case
for a trial in the state courts. The
Supreme Court of Virginia did not render
an opinion in this action but simply
stated: "As the decision is opinion" is
Adkins v. Children's Hospital, Inc.
226 Va. 27, 105 S.W.2d 142 (1938).
decided on March 4, 1934. A copy of the
decision of April 22, 1932 is captioned in
the Appendix to the Petition. The
petitioner has asked review in this Court
of the decision of the Supreme Court of
Virginia.
The facts relevant to the issue are
as follows:

FACTUAL SUMMARY

Goode is employed in the Motive Power Department of the Railroad as a machinist. App. at 13A. Machinists are assigned jobs based solely on seniority by hiring date. App. at 25A, 32A. Machinists may be assigned work in the geographic range from Norfolk, Virginia to Crewe, Virginia, approximately 125 miles from Norfolk. App. at 25A-26A, 32A-33A.

One of the sites where a machinist may be assigned to work in Norfolk, Virginia, is the Lamberts Point Yard. The Lamberts Point Yard is a coal loading terminal where coal mined in Virginia, West Virginia, and Kentucky is brought by train for transfer to ships. Goode worked at the Lamberts Point Yard. At the Lamberts Point Yard in Norfolk, a

machinist may be assigned to work at the 38th Street car shops, the Motive Power Building or the Roundhouse. App. at 26A, 33A. At the Lamberts Point Yard a machinist can be assigned a number of tasks, including: repairing railroad cars; rerailing derailed railroad cars; repairing and maintaining pushers (small electronic locomotives) and the Barney (a devise that pushes railroad cars up an incline); repairing and maintaining retarders; and releasing hand brakes on railroad cars. App. at 26A, 33A. Some of the job assignments may require the machinist to work on pier machinery, both over the water and in the shop. At least half of the work performed by Goode was in areas other than maintenance and repair of pier machinery. App. at 6A, 15A.

On February 11, 1985, Goode was assigned the duty of performing maintenance on an air cylinder on a retarder at the Lamberts Point Yard. App. at 18A. While performing the maintenance Goode was injured. A retarder is a device used to stop or slow the movement of railroad cars. App. at 27A, 34A. Retarders are used throughout the Railroad's system and are common to all railroads. App. at 27A, 34A, 48A-49A. Retarders are found at other coal unloading facilities which have no connection with loading ships, such as steel mills and power plants.

The retarder Goode was assigned to repair is located on land approximately six hundred feet from the coal loading piers at the Lamberts Point Yard in an apparatus called the southside dumper.

On February 11, 1947, Goose was
assigned the duty of performing
air-landings on an airfield at
Lancaster at the Lancaster point land-
ing. At 12:15, while performing the
air-landings, Goose was injured. A
reporter is a device used to stop the
the movement of railroad cars. The
121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

App. at 18A. Once a railroad car entering the dumper has stopped, it is seized by mechanical arms, turned upside-down and the coal is dumped from the car to a conveyor belt. Once the car is dumped, it moves by gravity to a "kick-back" incline, then by gravity it is free-rolled to an empty return yard for its trip back to the coal fields.

Once coal is dumped from the railroad cars, it is carried by a conveyor belt system from the southside dumper to the Belt Change House. In the Belt Change House the coal is transferred to another conveyor belt system that begins the ship loading process by carrying coal to large chutes on the pier. App. at 39A-49A.

As a railroad machinist, Goode is eligible for retirement benefits under

top at 15A. Once a carload of
entering the dryer has stopped, it is
turned by mechanical means, turned right-
down and the coal is dumped from the car
to a conveyor (15B). Once the car is
dumped, it moves by gravity to a "pick-
back" machine. From the gravity it is
line-dumped to an empty wagon yard for
its trip back to the coal fields.

When coal is dumped from the
railroad car, it is carried by a
conveyor belt system from the car to the
dryer to the belt change house. In the
belt change house the coal is transferred
to another conveyor belt system that
carries the coal to the large chutes on the
plant. (15A-15B).

As a railroad carload of 100 tons is
eligible for treatment, facilities must

the Federal Railroad Retirement System and to receive Railroad Retirement Board unemployment benefits when furloughed or dismissed due to illness or a disabling non-work related injury. The employment contract under which Goode works is negotiated under the Federal Railway Labor Act and his right to a hearing and to appeal any disciplinary action imposed by the Railroad is mandated by that Act. App. at 28A-29A, 35A-36A.

SUMMARY ARGUMENT

The decision of the Supreme Court of Virginia that Robert Goode is not a maritime employee under the Longshoremen's and Harbor Workers' Compensation Act is consistent with the decisions of this Court. A railroad worker is not performing traditional

longshoring work when repairing a railroad retarder system, and the worker is not a "maritime employee" under the Act. See Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). Such a railroad worker is covered by the Federal Employer's Liability Act for injuries received while on-duty. Conti v. Norfolk & Western Ry. Co., 566 F.2d 890 (4th Cir. 1977). There is no conflict between the decision of the Virginia Supreme Court in this case and the decisions of this Court or the Court of Appeals for the Fourth Circuit, and, consequently, review of the decision of the Supreme Court of Virginia is not necessary.

ARGUMENT

A RAILROAD WORKER MAINTAINING
RAILROAD EQUIPMENT AND NOT
PERFORMING TRADITIONAL LONGSHORING
WORK IS NOT A "MARITIME EMPLOYEE"
UNDER THE LHWCA.

The sole issue considered by the Supreme Court of Virginia, and for which the Railroad is seeking review by this Court, is whether a railroad worker who was injured while repairing railroad equipment which is used for braking railroad hopper cars, and who does not perform traditional longshoring activities, is a "maritime employee" under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901, et seq. ("LHWCA"). If the railroad worker is covered by the LHWCA, this Act is his exclusive remedy for the injury. If he is not a "maritime employee" he is

ARGUMENT

A RAILROAD WORKER MAINTAINING
RAILROAD EQUIPMENT AND NOT
TRANSPORTING FREIGHT OR PASSENGERS
IS NOT A "RAILROAD EMPLOYEE"
UNDER THE LMCA.

The sole issue considered by the
Supreme Court of Virginia, and for which
the railroad is seeking review by this
Court, is whether a railroad worker who
was injured while repairing railroad
equipment which is used for hauling
railroad hopper cars, and who does not
perform traditional long-hauling
activities, is a "railroad employee"
under the Longshoremen's and Harbor
Workers' Compensation Act, 33 U.S.C. Sec.
901, 42 P.S. (1964). If the railroad
worker is covered by the LMCA, this Act
is his exclusive remedy for the injury.
If he is not a "railroad employee" he is

entitled to relief under the Federal Employer's Liability Act, 45 U.S.C. Sec. 51 et seq. ("FELA"). The Virginia Supreme Court, relying upon its decision in Schwalb v. Chesapeake & Ohio Ry. Co., 235 Va. 27, 365 S.E.2d 742 (1988), and by implication its decision in White v. Norfolk & Western Ry. Co., 217 Va. 823, 232 S.E.2d 852, cert. denied, 434 U.S. 860 (1977), functionally concluded that the plaintiff, Robert Goode, was not performing a traditional longshoring task and thus, was not an employee under the LHWCA. The Railroad argues that these decisions of the Virginia Supreme Court are contrary to recent judicial interpretations of the 1972 Amendments to the LHWCA. The decisions of the Virginia Supreme Court are consistent with the

entitled to relief under the Federal
Employee's Liability Act, 45 U.S.C. Sec.
21 92 922 ("FECA"). The Virginia
Supreme Court, relying upon its decision
in Robinson v. Chesapeake & Ohio Ry. Co.,
125 Va. 37, 205 S.E.2d 119 (1964), and its
application of its decision in Robinson v.
Chesapeake & Ohio Ry. Co., 217 Va. 413,
213 S.E.2d 637, 1965-2 CB 141, 134 U.S.
960 (1977), accordingly concluded that
the plaintiff, Robert Gordon, was not
performing a traditional job function task
and, thus, was not an employee under the
FECA. The Railroad argues that these
decisions of the Virginia Supreme Court
are contrary to recent judicial
interpretations of the 1975 amendments to
the FECA. The decision of the Virginia
Supreme Court are consistent with the

dictates of this Court and the LHWCA, and review is not necessary.

A. The decision of the Virginia Supreme Court follows the opinions of this Court and the Court of Appeals for the Fourth Circuit.

The LHWCA provides compensation for the death or disability of any person engaged in "maritime employment," if the disability or death results from an injury incurred upon the navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or building a vessel. See 33 U.S.C. Sections 902-903. A worker claiming coverage under the LHWCA must satisfy both a "status" and a "situs" test.¹ See Herb's Welding, Inc. v. Gray,

¹ The 1972 Amendments to the LHWCA enumerated this two-pronged test. Section 903(a) of the Act sets forth the "situs"

discretion of this Court and the ILMCA, and

review is not necessary.

A. The decision of the Virginia
Supreme Court follows the decision
of this Court and the Court of
Appeals for the Fourth Circuit.

The ILMCA provides compensation for
the death or disability of any person
employed in "maritime employment," if the
disability or death results from an
injury incurred upon the navigable waters
of the United States or any adjoining
port or other area customarily used by an
employer in loading, unloading,
repairing, or maintaining a vessel. For
U.S.C. sections 901-903, a worker
claiming coverage under the ILMCA must
satisfy both a "vessel" and a "maritime"
test. See *North v. United States*, 100 F.2d 1001.

The ILMCA amendments to the ILMCA
enacted this two-pronged test. Section
903(a) of the act sets forth the

470 U.S. 414, 415 (1985); P. C. Pfeiffer
Co. v. Ford, 444 U.S. 69, 74-75 (1979).

Railroad workers, such as Robert

test where a longshoreman's claim must occur. It states:

Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. Sec. 903(a).

Section 902 of the Act defines the "status" test, that is, the status an employee must occupy before the LHWCA applies. It states:

The term 'employee' means any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder and shipbreaker

33 U.S.C. Sec. 902(3).

Goode, have historically asserted claims under the FELA and have not been covered under the LHWCA. It is only in cases where a railroad employee has clearly been over the water or on a pier or a near by attachment, and was working with equipment directly involved in the actual movement of goods to ships, that the railroad worker has been removed from FELA coverage and placed under the LHWCA. See, e.g., Price v. Norfolk & Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980). The decision of the Virginia Supreme Court that Goode was not covered by the LHWCA is consistent with the rulings of this Court.

In Herb's Welding Co. v. Gray, supra, this Court was presented with the question of whether a welder working on a fixed offshore oil-drilling platform was

covered by the LHWCA. The Court of Appeals for the Fifth Circuit had held that Gray's work as a welder had "a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters" and therefore extended coverage of the LHWCA to him. 470 U.S. at 418-19. This Court concluded that the Fifth Circuit had taken too expansive a reading of maritime employment which was the equivalent of ruling that anyone performing any task that is part and parcel of maritime commerce is in maritime employment for LHWCA purposes. 470 U.S. at 421. Concluding that Gray was not covered by the LHWCA, this Court stated the following concerning the 1972 Amendments to the LHWCA:

The expansion of the definition of navigable waters to include rather

covered by the LHWCA. The Court of Appeals for the Fifth Circuit has held that Gray's work as a welder had "a qualitatively significant relationship to traditional maritime activity involving navigation and commerce on navigable waters" and therefore extended coverage of the LHWCA to him. 470 U.S. at 442-43. This Court concluded that the Fifth Circuit had taken too expansive a reading of maritime employment which was the equivalent of asking that anyone performing any task that is part and parcel of maritime commerce is in maritime employment for LHWCA purposes. 470 U.S. at 443. Concluding that Gray was not covered by the LHWCA, this Court stated the following concerning the 1972 Amendments to the LHWCA:

The purposes of the definition as navigable waters to include rather

large shoreside areas necessitated an affirmative description of the particular employees working in those areas who would be covered. This was the function of the maritime employment requirement. But Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading; it is "clear that persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered." Northeast Marine Terminal Co. v. Caputo, 432 U.S. at 267. While "maritime employment" is not limited to the occupations specifically mentioned in Sec. 2(3), neither can it be read to eliminate any requirement of a connection with the loading or construction of ships. As we have said, the "maritime employment" requirement is "an occupational test that focuses on loading and unloading." P. C. Pfiffer Co. v. Ford, 444 U.S. 69, 80 (1979). The Amendments were not meant "to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they were injured in an area adjoining navigable waters used for such activity." HR. Rep. NO. 92-1441, p. 11 (1972); S. Rep. NO. 92-1125, p. 13 (1972). We have never read "maritime employment" to

Large enterprises are not necessarily
an alternative description of the
business activities working in
these areas - who would be covered.
This was the function of the
various occupational requirements.
But Congress did not seek to cover
all those who treated as a
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workers on the other who are
involved in the essential elements
of loading and unloading. It is
clear that persons who are in the
line are not engaged in the
overall process of loading or
unloading vessels and not covered.
Section 101(1) of the Act
states that U.S. at 107. While
"occupational requirements" is not
limited to the occupations
specifically mentioned in the
Act, neither can it be read to
eliminate any requirement of a
connection with the loading or
unloading of ships. As we have
said, the "occupational requirements"
requirement is an occupational
test that focuses on loading and
unloading. E. C. Miller, Jr.
1011, 445 U.S. 12 (1979). The
assessments were to cover "the cover"
employees who are not engaged in
loading, unloading, repairing, or
building a vessel. That business
they were involved in as
shipping vessels. Vessels used for
such activities. 1011, 445 U.S.
1241, 445 U.S. 1241 (1979). E. C. Miller, Jr.
1011, 445 U.S. 1241 (1979). The
"occupational requirements" to

extend so far beyond those actually involved in moving cargo between ship and land transportation [footnotes omitted].

470 U.S. at 423-24.

Similarly, in Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977), this Court extended LHWCA coverage to a checker and a terminal laborer who were performing traditional longshoring functions in connection with the movement of cargo from a ship to land transportation. In discussing the status test, this Court stated:

[The intent is] to cover those workers involved in the essential elements of unloading a vessel--taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area.... [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truck drivers, whose responsibility on the waterfront is to pick up or deliver cargo unloaded from or destined for

extend no far beyond those actually
involved in moving cargo between
ship and land transportation
(Litchner stated).

476 U.S. at 423-24

Similarly, in Northwest Marine
Terminal Co. v. City, 478 U.S. 542
(1987), the Court extended ILWU
coverage to a check-out and a terminal
laborer who were performing traditional
longshoremen functions in connection with
the movement of cargo from a ship to land
transportation. In discussing the status
test, this Court stated:

(The intent is) to cover those
workers involved in the essential
elements of unloading a vessel—
taking cargo out of the hold,
moving it away from the ship's
side, and carrying it immediately
to a storage or holding area....
[Persons who are on the pier but
are not engaged in the transfer
process of loading and unloading
vessels are not covered.] Thus,
employees such as truck drivers,
whose responsibility on the
waterfront is to pick up or deliver
cargo unloaded from or loaded for

maritime transportation are not covered.

249 U.S. at 266-67 See also Northeast Marine, 249 U.S. at 266 n.27.

The Caputo decision makes it clear that unless the activities of an employee are closely related to the actual loading or unloading of a vessel, the employee is not covered by the LHWCA, and an employee involved in land transportation is not covered by the LHWCA.

The nature of the work being performed by the employee was again emphasized by this Court in P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979), when it extended LHWCA coverage to a warehouseman who was injured while fastening military equipment to railroad flat cars and to a cotton header who was injured while unloading a bale of cotton from a dray wagon into a pier warehouse. This Court

carrying transportation are not covered.

249 U.S. at 266-67. See also *McIntosh*.

McIntosh, 249 U.S. at 266 n.27.

The Circuit decision makes it clear that unless the activities of an employee are closely related to the actual loading or unloading of a vessel, the employee is not covered by the ILWCA, and an employee involved in land transportation is not covered by the ILWCA.

The nature of the work being performed by the employee was again emphasized by this Court in *E.C. Pfeiffer*, 297 U.S. 107, 444 U.S. 62 (1975), when it extended ILWCA coverage to a warehouseman who was injured while loading military equipment to railroad flat cars and to a cotton header who was injured while unloading a bale of cotton from a dry wagon into a pile warehouse. This Court

emphasized that the plaintiffs were "engaged in the types of duties that longshoremen perform in transferring goods between ship and land transportation." 444 U.S. at 81. Performing traditional longshoring work is critical to coverage under the LHWCA. In addition, this Court reemphasized that employees involved in land transportation are not covered by the LHWCA. 444 U.S. at 83.

The present situation falls squarely within the direction provided in Herb's Welding, Caputo, and Pfeiffer. Robert Goode was injured while performing maintenance on machinery which was used solely for braking railroad cars as they moved into the terminal. Until the unloading process had been completed, the coal was still in land transportation and

stipulated that the plaintiff was
"engaged in the type of duties that
longshoremen perform in transferring
goods between ship and land
transportation." 444 U.S. at 811.
Performing traditional longshoremen work
is critical to coverage under the LHWCA.
In addition, this Court emphasized that
employees involved in land transportation
are not covered by the LHWCA. 444 U.S.
at 811.

The present situation falls
squarely within the direction provided in
NLRB v. Bell, 449 U.S. 863, 868 (1981).
Robert Goetz was injured while performing
maintenance on machinery which was used
solely for breaking railroad cars as they
moved into the terminal. Until the
refueling process had been completed, the
coal was still in land transportation and

was not in the process of being loaded aboard a ship. The maintenance work performed by Goode was work traditionally performed by railroad workers and not by longshoremen. The Railroad wishes to ignore this distinction and apply the LHWCA to Goode. This would be the equivalent of not only extending LHWCA coverage to truck drivers who are bringing goods to a terminal for eventual shipment, but also to the mechanic who repairs the truck which breaks down while on the terminal.

The decision of the Virginia Supreme Court in this matter is entirely consistent with the decision of the Court of Appeals for the Fourth Circuit in Conti v. Norfolk & Western Ry. Co., 566 F.2d 890 (4th Cir. 1977). In Conti, the Fourth Circuit determined that the LHWCA

should not be extended to two brakemen and a conductor-brakeman who are employed by the Railroad at the Lamberts Point Terminal. Each of the employees had been injured while moving railroad cars through the unloading process. In concluding that the workers were not covered by the LHWCA the Fourth Circuit stated:

It is clear that in the cases before us the occupation of the plaintiffs were not of a traditionally maritime nature, but on the contrary were those traditionally associated with railroading. Their tasks and responsibilities with respect to the unloading of the coal from the hopper cars would have been the same at an inland terminal as they were at Lamberts Point, and the sophisticated automation of the facilities at the latter terminal should not obscure the basic fact that the plaintiffs were engaged in unloading a coal train, not loading a vessel. We find nothing in the Amendments or the legislative history [to the LHWCA] to indicate that under the circumstances the Congress intended to transfer the

should not be extended to two persons
and a conductor-business who are employed
by the railroad at the same place.
Further, each of the employees had been
injured while working on the
train. The railroad
contending that the workers were not
covered by the FELA the Fourth Circuit
stated:

It is clear that in the cases
before us the composition of the
plaintiffs was not of a
traditionally unitary nature, but
on the contrary was
traditionally associated with
their tasks and
responsibilities with respect to
the unloading of the coal from the
hopper cars would have been the
same as an inland terminal or they
were at various points and the
regulated operation of the
facilities at the latter terminal.
should not convert the basic fact
that the plaintiffs were engaged in
unloading a coal train, not loading
a vessel. We find nothing in the
language of the legislative
history (as the FELA) to indicate
that these circumstances are
different enough to exclude the

redress of such injured railroad workers from the FELA to the Longshoremen's Act.

566 F.2d at 895.

This decision of the Fourth Circuit is directly applicable to Goode and is in complete conformity with the decisions of the Supreme Court of Virginia and this Court. The only difference between the Fourth Circuit decision in Conti and the present case, is that Goode was a railroad maintenance employee who was repairing the equipment used to brake the railroad cars prior to unloading rather than a brakeman actually participating in the unloading process and using that equipment.

The Railroad argues in its Petition that "workers who maintain or repair equipment essential to loading vessels are maritime employees for LHWCA

Section 10 of the Virginia Railway
Act, 1908, Chapter 111, Section 10, reads as follows:

Sec. 10. That the

This decision of the Fourth Circuit
is directly applicable to the case and is
completely contrary with the decision of
the Supreme Court of Virginia and this
Court. The only difference between the
Fourth Circuit decision in *Smith* and the
present case is that *Smith* was a
railroad maintenance employee who was
operating the equipment used to break the
railroad cars prior to unloading rather
than a person actually participating in
the unloading process and using that
equipment.

The railroad argues in its petition
that "persons who maintain or repair
equipment essential to loading or unloading
cars are railroad employees for

purposes." See Petition at 23-27. Goode, however, was not repairing ship loading equipment; he was performing maintenance on railroad equipment which is used to brake railroad cars as they come onto the terminal. Such equipment is traditionally associated with railroading and is not unique to ship terminals. Conti, 566 F.2d at 895.

The decision of the Virginia Supreme Court is consistent with the decision of the Court of Appeals for the Fourth Circuit in Price v. Norfolk & Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980). In Price, the Fourth Circuit found that a worker who was injured while performing routine maintenance on the "gallery" at the Railroad's grain elevator complex at Sewells Point was a maritime employee. The grain is loaded

proposed. The petition of 11-21-1911, however, was not repeated and existing equipment, as was proposed, was maintained on railroad equipment which is used as trucks without cars as they come onto the terminal. Such equipment is traditionally associated with railroading and is not unique to ship terminals. (Conf. 11-21-1911 at 892.)

The decision of the Virginia Supreme Court is consistent with the decision of the Court of Appeals for the Fourth Circuit in Wade v. Hollister, 100 F.2d 811, 21-1019 (4th Cir. 1936). In Wade, the Fourth Circuit found that a worker who was injured while performing routine maintenance on the "galleys" of the railroad's grain elevator, was an employee. The grain is loaded

onto ships by a conveyor belt system housed in a structure called the gallery. The gallery belt system was used only for loading and unloading vessels. 618 F.2d at 1060-61. The Court concluded that the worker was involved in the maintenance and repair of longshoring machinery which was essential to the movement of cargo. 618 F.2d at 1061. In other words, the worker was performing traditional longshoring tasks in connection with the loading or unloading of cargo. Citing Conti, the Fourth Circuit in Price implicitly recognized that if the worker had been injured while repairing railroad equipment and not loading equipment, the LHWCA would not apply. 618 F.2d at 1062.

This Court has recognized that there must be a boundary to coverage under the LHWCA. See Herb's Welding, 470

U.S. at 426-27. Nacirema Operating Co. v. Johnson, 396 U.S. 212, 223-24 (1969). In Herb's Welding, Caputo, and Pfeiffer, this court established that line. If a worker is performing traditional longshoring work and is involved in moving cargo between ship and land transportation, the worker will fall within LHWCA coverage. Conversely, if a worker is not performing traditional longshoring work or is not involved in moving cargo between ship and land transportation, the worker is not covered by the LHWCA. The line established in these cases has not been violated by the Supreme Court of Virginia in not extending LHWCA coverage to Goode. Goode, a railroad employee, was performing maintenance to equipment which is unique to railroad operations and

U.S. 419-27. Hackman, Gregory, Co.
T. Johnson, 306 U.S. 212, 223-24 (1934).
In Harris v. United States, 332 U.S. 106, 112 (1948),
this Court established that line. If a
worker is performing traditional
transporting work and is involved in
moving cargo between ship and land
transportation, the worker will fall
within LMRCA coverage. Conversely, if a
worker is not performing traditional
transporting work or is not involved in
moving cargo between ship and land
transportation, the worker is not covered
by the LMRCA. The line established in
these cases has not been violated by the
Supreme Court of Virginia in not
extending LMRCA coverage to Google.
Google, a railroad employee, was
performing maintenance in equipment which
is unique to railroad operations and

found throughout the railroad system. The work Goode was performing is not traditional longshoring work but is traditional railroad work. Also, the equipment Goode was working on is used to brake railroad cars as they come onto the terminal; it is not ship loading equipment. Goode was not involved in ship loading activities or in moving cargo between ship and land transportation, but in traditional railroad activities, and therefore, is covered by FELA as opposed to LHWCA. The only factor which brings up the issue of LHWCA coverage is that Goode was performing maintenance to the railroad equipment at the Lambert's Point Terminal. LHWCA coverage is not even an issue for the same class of railroad employee performing the same work at

found throughout the railroad system. The work done was performed in not traditional transporting work but in traditional railroad work. Also, the equipment used was working on its side to make railroad cars as they come onto the terminal. It is not ship loading equipment. Goods are not involved in ship loading activities or in moving cargo between ship and land transportation, but in traditional railroad activities, and therefore is covered by FELA as opposed to LMRCA. The only factor which brings up the issue of LMRCA coverage is that goods are being transported to the railroad equipment at the lumber's Point Terminal. LMRCA coverage is not even an issue for the vast class of railroad employees performing the same work as

another Norfolk and Western facility. This single factor is not sufficient to take Goode out of the FELA scheme and place him under LHWCA. Robert Goode is not a maritime employee under the LHWCA and the decision of the Virginia Supreme Court to this affect is consistent with the decisions of this Court and the Court of Appeals for the Fourth Circuit.

B. Railroad workers are adequately protected by FELA.

As a railroad worker, Goode has an adequate means of redress for his injuries under FELA. The FELA has been the equivalent of a compensation statute since 1908. It has consistently been viewed as remedial in nature. Hoepfner v. Northern Pac. Ry. Co., 61 F. Supp. 819 (D.C. Mont. 1945). It has worked well, and has not been under attack for

11
The... and... facilities...
This... factor is not sufficient to
take... out of the... scheme and
place him... Robert... in
not a... order the...
and the... of the... response
over to this... is... with
the... of this... and the...
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... and has not been... for

inadequacy by either the workers protected by the statute or the railroads. Even though FELA is a "jury trial" system rather than a "no-fault" compensation system, workers are receiving adequate compensation for on-duty injuries. When LHWCA was amended in 1972, the focus was on workers who passed into and out of the LHWCA system and into inadequate state systems, and not on the alternative FELA system. As such, there is no policy reason to extend LHWCA beyond the limits already established so as to include railroad workers like Goode.

CONCLUSION

For the above stated reasons, the Respondent, Robert T. Goode, Jr., prays that the Petition for a Writ of

independence by either the workers
 protected by the statute or the
 railroad. Even though this is a "jury
 trial" system rather than a "no-fault"
 compensation system, workers are
 receiving adequate compensation for on-
 the-job injuries. When LNUCA was amended in
 1971, the focus was on workers who passed
 into and out of the LNUCA system and for
 inadequate notice systems, and not on the
 alternative this system. As such, there
 is no policy reason to extend LNUCA
 beyond the limits already established so
 as to include railroad workers like
 Co. No.

CONCLUSION

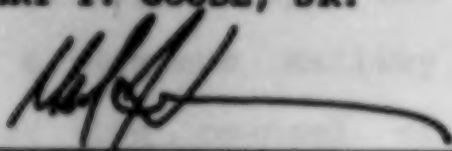
For the above stated reasons, the
 Respondent, Robert T. Good, Jr., prays
 that the petition for a writ of

Certiorari of the Petitioner, Norfolk and
Western Railway Company be denied.

Respectfully submitted,

ROBERT T. GOODE, JR.

By



Of Counsel

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Consent of the Railway, Norfolk and
Western Railway Company be denied.
Respectfully submitted,

ROBERT F. GOODE, JR.

By _____
Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Brief in Opposition to Writ of Certiorari upon the Petitioner, Norfolk & Western Railway Co., at the office of its counsel of record, Edward L. Oast, Jr., Williams, Worrell, Kelly and Greer, P.C., 600 Crestar Bank Building, Norfolk, Virginia 23510, pursuant to the requirements of Rules 28 and 33 of the Rules of the Supreme Court of the United States, by depositing same in a United States mail box, with first class postage prepaid, addressed to Petitioner as set forth above, on or before August 19th, 1988.

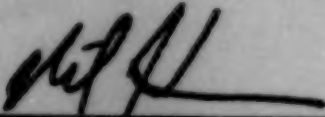
I further certify that I am a member of this Court, and that all

STATEMENT OF WITNESS

I hereby certify that I have taken
true copies of this trial in
opposition to this of testimony upon the
testimony. Witness a western railway
Co., at the office of its counsel of
counsel. Dated at New York, N.Y., this
day of July, 1907.
Charles Mack Building, New York, Virginia
this, pursuant to the requirements of
law, is and is to the effect of the
supreme Court of the United States, be
deposited also in a United States mail
box with this clerk postpaid prepaid,
addressed to testimony as set forth
above, as of record August 15, 1907.
I further certify that I am a
member of this Court, and that all

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parties required to be served have been
served on or before August 19TH,
1988



Richard J. Tavss
Of Counsel for Respondent

Deposition upon oral examination of ROBERT T. GOODE, JR., taken on behalf of the Defendant, before Joy J. Gossett, a Notary Public in and for the Commonwealth of Virginia, taken pursuant to Notice, commencing at 11 a.m., on the 27th day of June, 1986 at the office of Williams, Worrell, Kelly & Greer, 600 United Virginia Bank Building, Norfolk, Virginia; and this in accordance with the Rules of the Supreme Court of Virginia, 1950, as amended.

* * * * *

(Whereupon, the witness was sworn.)

ROBERT T. GOODE, JR.,
called as a witness, having been
first duly sworn, was examined
and testified as follows:

Deposition taken at the residence of
Walter J. Brown, Jr., taken on behalf of the
Government, before J. H. Brown, a Notary
Public, in and for the Commonwealth of
Virginia, dated and signed by the Notary
on the 17th day of June, 1918, at the office of the
Notary, in the City of Washington, D.C., and this
deposition is a true and correct copy of the
deposition taken on the 17th day of June, 1918, at the
office of the Notary, in the City of Washington, D.C.

Witness my hand and the seal of the Notary
Public for the Commonwealth of Virginia, at the
City of Washington, D.C., this 17th day of June, 1918.

Walter J. Brown, Jr.,
Notary Public for the Commonwealth of Virginia,
in and for the Commonwealth of Virginia,
at the City of Washington, D.C., this 17th day of June, 1918.

EXAMINATION:

BY MR. RICHARDSON:

Q Mr. Goode, my name is John Richardson, and I represent the railroad in this matter.

If there are any questions you don't understand, tell me, and I will try to make them

Q Okay. That's after three months in '72. Was that nothing to do with the employment at the railroad? You were just looking for a better job; is that it?

A That's correct.

Q How long were you a police officer?

A Six years and ten months.

Q Just patrolman or --

A Yes.

EXHIBITATION:

BY MR. RICHARDSON:

Q Mr. Goble, my name is John

Richardson, and I represent the railroad in

this matter.

Q If there are any questions you

don't understand, tell me, and I will try to

make them . . .

Q

Q Okay. Just a after three months

in 1971, was that nothing to do with the

employment at the railroad? You were just

looking for a better job, is that it?

A That's correct.

Q How long were you a police

officer?

A Six years and six months.

Q Last question or --

A Yes.

Q And why did you leave the police department?

A To come back to the railroad.

Q Any particular reason or just tired of being a police officer?

A Tired of being a police officer.

Q When did you come back to work?

A January 19th, 1979.

Q Okay. Did you go back to B & B department?

A No.

Q Tell me what you were employed as that time.

A I went into the motive power department.

Q And have you been in the motive power department from then on?

A Yes.

Q To the present day?

Q And why did you leave the police
department?
A To come back to the railroad.
Q Any particular reason for the
change of being a police officer?
A Yes, of being a police officer.
Q When did you come back to work?
A January 1974, 1974.
Q Now, did you work for a A B

department?
A Yes.
Q Tell me what you was assigned to
do there.
A I went into the police power
department.
Q And what was your job in the police
power department from then on?
A Yes.
Q At the present day

A Yes, sir.

Q Tell me a little bit about the motive power department. What is its job primarily?

A What is my job?

Q Let's talk about the department first.

A Basically to run the east end of the railroad.

Q Okay. Is there equipment that the motive power department is particularly responsible for?

A Yes, sir.

Q Tell me about that equipment they are responsible for.

A The thaw sheds, the pushers, the barneys, the dumpers, the conveyer belts.

Q It is fair to say they are responsible for everything on the railroad east of the thaw sheds?

A Yes, sir.

Q Tell me a little bit about the
active house department. What is its job
responsibility?

A That is my job.

Q Tell a little about the department.

That.

A Basically to run the house and to
the railroad.

Q Okay. Is there equipment that
the active house department is particularly
responsible for?

A Yes, sir.

Q Tell me about that equipment that
the department has?

A The fire alarm, the house, the
house, the house, the house, the house.

Q It is felt to be that the
responsible for everything of the railroad
part of the house?

A Including the thaw shed.

Q Is that where their line sort of stops and comes towards the dumpers?

A No, not really, because we work on equipment at Portlock.

Q What kind of equipment do you work on at Portlock?

A Forklifts, railroad engines.

Q Do you do that at Lambert's Point also?

A Yes, sir.

Q Okay. If you had to say what motive power mainly dealt with on a day-to-day basis, would you say the equipment in the coal loading system from the thaw shed to east?

A No, we work on all of the equipment.

Q Okay. And -- but I am talking about -- do you understand my question?

Q Including the time spent in the field, how long did it take you to complete the work on the equipment at Fort Belvoir?

A It took about three weeks to complete the work on the equipment at Fort Belvoir.

Q What kind of equipment was it?

A It was a piece of equipment that was used for testing the equipment at Fort Belvoir.

Q Do you do that at Fort Belvoir?

A Yes, sir.

Q Now, if you had to say what the most serious difficulty was in doing this work, what would you say the equipment is?

A The most serious difficulty was the fact that the equipment was old and it was difficult to get it to work.

Q Now, did you have any other work to do on the equipment at Fort Belvoir?

A Yes, sir.

I am saying, does the motive power department primarily work on the equipment in the coal loading process from the thawing shed to east? Is that your primary responsibility?

A No.

Q Do you spend as much time working on the forklifts as you do the coal loading equipment?

A Yes, sir.

Q Okay. You spend more time working on that stuff like railroad engines and forklifts as you do on the coal loading equipment?

A I would say more time spent on the forklifts and thaw sheds.

Q Okay. More time spent on forklifts than thaw sheds?

A No, and thaw sheds.

I am saying, then, the motive
power department is primarily with the
equipment in the coal loading process. This
the thinking about the matter. Is that your
primary responsibility?

Yes.
Q. On the spot as you are working
on the facilities as you do the roll-loading
equipment?

Yes, sir.
Q. Now, you are working on the
equipment as that matter like rollers, rollers
and equipment as you do the coal loading
equipment?

Yes. I would say that the steps on
the facilities and then about.
Q. Now, that is the way you
operate the equipment?

Yes, and that is the way you
operate the equipment.

Q Okay. And barneys and pushers?

What I am getting at is, Mr. Goode, do you spend more time working on thaw sheds and that kind of stuff than you do forklifts and that kind of stuff?

MR. WILSON: Excuse me. John, if I could interject this. I am not certain it's clear what you are understanding -- what you are asking. If you defined what you consider to be unloading equipment --

MR. RICHARDSON: I thought I had.

BY MR. RICHARDSON:

Q Assume --

MR. WILSON: We might not accept your definition, but --

MR. RICHARDSON: I understand that.

BY MR. RICHARDSON:

Q I will lump everything that goes into the coal dumping and loading process

Gray. And Perrygo and Gushaw?
What I am getting at is, Mr.
Gordon, do you spend more time working on
these things and that kind of stuff than you
do technical and that kind of stuff?

MR. WILSON: Because Mr. John, if
I could interpret this, I am not certain
it's clear what you are understanding --
what you are asking. If you defined what
you consider to be technical equipment --
MR. RICHMOND: I thought I had.

BY MR. RICHMOND:

O. Answer --

MR. WILSON: We might not accept
your definition, but --
MR. RICHMOND: I understand.

BY MR. RICHMOND:

O. I will keep everything that goes
into the cost during and loading process

from the thaw sheds east, railroad east as coal equipment. Is that okay? Can you accept that? I am not asking you to agree, but for the purposes of my question, assume that.

Now, percentage-wise, if you can do this, tell me how much time the motive power department spends on the coal equipment as opposed to things like forklifts, railroad engines, and that kind of thing.

MR. WILSON: Before you answer it, I want to object to the form of the question. There has been no foundation laid to show that the coal unloading facilities start at the thaw shed. I think it would be -- we are assuming that for the purposes of the question.

from the fact that we, the United States, are
not equipped. In fact, they can't
even afford to ask me for money, but for the purpose of my question,
that.

Now, percentage-wise, if you can
to this, tell me how much time the active
person - department - spends on the coal
equipment as opposed to things like
fertilizer, electric engines, and that kind
of thing.

MR. WILSON: Before you answer
it, I want to object to the form of the
question. There has been no foundation laid
to show that the coal-mining fertilizer
part of the law was a thing it would be
- we are assuming that for the purpose of
the question.

MR. RICHARDSON: Right. I understand that. I am not saying my definition is definitive.

I am trying to get an idea of how much time the motive power department spends on equipment such as the thaw shed, the barneys, the pushers, the dumpers, and what I would classify as coal loading or dumping equipment. Okay.

BY MR. RICHARDSON:

Q Can you answer that question?

A I am not sure.

Q Okay. Who would know that?

A I don't know that either.

Q Who is your supervisor?

A My immediate supervisor is Bobby Jones.

Q And who is his boss?

A Chain of command would be Arnold Meadows.

Q Head of B & B or motive power?

A No, assistant general foreman.

Q Okay. Let's keep going. Who is next?

A Dillard Bates or D. T. Bates.

Q What is his title?

A General foreman.

Q All right. Anybody higher?

A Bobby Edwards is assistant master mechanic.

Q Mr. Crowder then?

A Yes.

MR. WILSON: Is that Herb Crowder we are talking about?

MR. RICHARDSON: Yes.

BY MR. RICHARDSON:

Q He is the master mechanic, right, Mr. Goode?

A Yes.

1. The first of the three is the
2. The second of the three is the
3. The third of the three is the

4. The fourth of the three is the
5. The fifth of the three is the
6. The sixth of the three is the
7. The seventh of the three is the
8. The eighth of the three is the

9. The ninth of the three is the
10. The tenth of the three is the
11. The eleventh of the three is the
12. The twelfth of the three is the
13. The thirteenth of the three is the

14. The fourteenth of the three is the
15. The fifteenth of the three is the
16. The sixteenth of the three is the
17. The seventeenth of the three is the
18. The eighteenth of the three is the

Q He is sort of in charge of the motive power department?

A Yes, sir.

Q Okay. Now, since you came back to work with the motive power department in January of 1979, what has been your job? What was your initial job in January of 1979?

A Line tender and helper.

Q What does that do? What do they do?

A Basically help the electricians and machinists.

Q Do what?

A Perform repair work.

Q On this kind of equipment we have been talking about earlier?

A On anything.

Q What else did you do?

Q. He is not at all capable of the

active power relationships

A. Yes, sir.

Q. Okay. Now, since you agree that

the work with the active power department in

January of 1973, that has been your job?

That was your initial job in January of

1973.

A. This transfer was made,

Q. When does that and when do you

not

A. Basically, this was electricians

and technicians.

Q. So what?

A. Perhaps repair work.

Q. On this kind of assignment we have

been training about earliest.

A. As mentioned.

Q. What else did you do?

A Tied up ships on the pier.

Q Okay. Whenever a ship would come in or leave, y'all would tie and untie the ships?

A That's correct.

Q How long were you a line tender and helper?

A Three months.

Q Then what did you become?

A Machinist apprentice.

Q And that essentially means you work on all equipment that you were describing earlier? Is that what the machinist does?

A Yes, sir, works on cars, trucks, forklifts, railroad cars.

Q And how long were you apprentice?

A It's a four-year apprenticeship.

Q Have you moved up to a machinist yet?

A Yes, sir.

Q When did that occur?

A I am not sure of the date.

Q All right. How long, a couple of years ago?

A Yes, sir.

Q And you are a machinist today?

A Yes, sir.

Q And I take it a machinist does the same thing a machinist apprentice does essentially?

A Yes.

Q Work on cars, trucks, forklifts, things like that?

A Yes, sir.

Q All right, just clarify something for me, Mr. Goode. Do you actually go to the car shop and work on cars, rail cars?

A I don't go to the car shop and work on cars.

Q Yes, sir.

Q When did they occur?

A I am not sure of the date.

Q All right. Now how, a couple of years ago?

A Yes, sir.

Q And you are a machinist today?

A Yes, sir.

Q And I take it a machinist does the same thing a machinist apprentices does, is that right?

A Yes.

Q Work on cars, trucks, motorcycles, things like that?

A Yes, sir.

Q All right, just exactly working for me, is that so? To put screws on in the car body and work on cars.

Q Where do you work on rail cars?

A At the scale office, in the thaw shed, and in the barney pit, and sometimes the dumper.

Q When cars get stuck there or something, is that when you work on them?

A Yes, sir. And if something is wrong with the car, we work on it before it goes into the dumper.

Q When you work on a car, it's on the track between the thaw shed and the -- whatever the yard is where they go after being dumped?

A Sometimes they are not on the track.

Q What do you mean "sometimes"?

A Sometimes they are derailed, and we have to put them back on the track.

Q Where do you work on rail cars?

A At the scale office, in the train

shed, and in the battery pit, and sometimes

the engine.

Q When cars get stuck there or

something is lost when you work on them?

A Yes, sir. And if something is

wrong with the car, we work on it before it

goes into the danger.

Q When you work on a car, is it on

the track between the two sheds and the

warehouse, the yard is where they go after

being damaged?

A Sometimes they are not on the

track.

Q What do you mean "sometimes"?

A Sometimes they are derailed, and

we have to get them back on the track.

Q Okay. It's generally out of necessity to keep the coal process running, is that fair to say?

A I guess so.

Q Okay. What I am getting at is, you just don't inspect cars, and you don't -- if you see something wrong that needs to be fixed, you don't stop the coal loading process to work on cars?

A It would depend on the severity of what needed to be fixed.

Q Okay. Is that something that happens on a regular basis?

A No.

Q Okay. So what do you do most of the time?

A Perform repair work on the equipment for the railroad.

Q Okay. All right, Mr. Goode, tell us what happened on the day you got hurt.

Q Okay. It's generally not
necessarily to keep the coal process running.
is that fair to say?
A I guess so.
Q Okay. What I am getting at is,
you just don't expect cars, and you don't
-- if you see something wrong that needs to
be fixed, you don't stop the coal feeding
process to work on cars?
A If you'd depend on the severity
of what needed to be fixed.
Q Okay. Is that something that
happens on a regular basis?
A No.
Q Okay. So what do you do most of
the time?
A Perform repair work on the
equipment for the railroad.
Q Okay. All right, Mr. Gotsch, call
us what happened on the day you got hurt.

A Where do you want me to begin?

Q Let's start with when did you come on that day?

A At 7 a.m.

Q Is that your typical shift, 7 to 3?

A Yes, sir.

Q And when you came on, who do you go to for direction on what to do that particular day?

A Report at the lunchroom at the motive power building.

Q Where is the motive power building?

A Lambert's Point.

Q I am not being cute. I am trying to get questions that are relevant to this case. If you don't like the questions I ask, that is something you discuss with your counsel.

Q. What do you want to be doing?

A. I want to be a doctor.

Q. When will you be a doctor?

A. In 1955.

Q. Is that your typical shift?

A. Yes, sir.

Q. And when you come in, what do you

do for the first few days?

A. I report to the hospital at the

beginning of the shift.

Q. Where is the hospital?

A. In the city.

Q. I am not being clear. I am trying

to get questions that are relevant to this

case. If you don't like the questions I

ask, that is something you discuss with your

I expect courtesy, and I am not giving you trouble, and I expect the same in return.

MR. WILSON: I might interject. I don't think he is doing that. He is trying to be responsive but --

MR. RICHARDSON: I don't think I am harassing him.

MR. WILSON: No, and I don't think he is intentionally doing anything to you. I am sorry you took it like that.

Bob has been instructed the answer the questions as you ask them, and if you ask him which end, he will get to it. He is not doing that intentionally.

You shouldn't take it that way, John. You are too sensitive.

BY MR. RICHARDSON:

Q Do you understand my question, Mr. Goode?

I expect, perhaps, that I am not
giving you trouble, and I expect the same in
return.

MR. WILSON: I don't believe
I don't think he is doing that. I am
trying to be responsive but
MR. RICHMOND: I don't think I

am bothering him.
MR. WILSON: No, and I don't
think he is intentionally being evasive.
You: I am sorry you see it that way.
But has that frustrated you
about the questions he has asked and if
you ask him when and he will not do it,
he is not doing that intentionally.

You shouldn't take it that way.
John: You are not sensitive.
BY MR. RICHMOND:

To you, understand my question

is correct.

A Yes, sir.

Q All right. Where with respect to the Elizabeth River is the motive power building? Is it down there near the piers or up near the claim department and superintendent's office?

A Approximately 150 yards east of the Elizabeth River.

Q Okay. Near the piers?

A Near them.

Q Okay. You report there. Who tells you what to do, if anybody?

A Bobby Jones.

Q Okay. What did he tell you to do on the day you were hurt?

A To go the south dumper and check and repair the retarders.

Q Okay.

A Retarders are what stops the coal cars.

A Yes, sir.

Q All right. Where with respect to

the Elkhorn River is the motive power
belonging to it down there near the place
of up past the main department and

approximately a mile?

A Approximately 150 yards east of

the Elkhorn River.

Q Okay. Near the place?

A Near there.

Q Okay. You report that the

tail race was in the Elkhorn River?

A Bobby Jones.

Q Okay. What did he tell you to do

on the day you were hurt?

A To go to the south dam and check

and repair the structure.

Q Okay.

A He told me to check the coal

Q They act like a cushion or something when they unload it?

A Braking system.

Q Is it after they have been unloaded or while they are being unloaded or prior to being dumped?

A Prior.

Q Okay. They are on the dumpers themselves?

A Yes, sir.

Q Tell me a little bit about how the retarders play a role in the dumping process.

A They stop the coal cars in place.

MR. WILSON: Before you answer that, I object to the form of the question. You are assuming they are involved in the dumping process.

MR. RICHARDSON: Sure. I understand.

MR. WILSON: Go ahead and answer it, Bob.

BY MR. RICHARDSON:

Q Can you tell me when coal cars come to the dumper, what does the retarder do?

out to look at retarders for maintenance problems? Is this typical of --

A Yes, sir.

Q And how often do you have to replace the sword and pins?

A I don't know. Somethings you have to replace them, and sometimes you don't.

Q Can you go years without replacing them? Is this something you do every month or every six months or --

A You check them more often, and I am not sure the length of time they last.

THE WITNESS: He heard the witness

11. Now.

BY MR. WATKINS:

Q Can you tell us when that call
came to the house, what time the witness

Q Now to look at the witness for the witness
proceeds to this typical of --

A Yes, sir.

Q And how often do you have to
replace the wires and glass?

A I don't know. Sometimes you
have to replace them, and sometimes you

don't.

Q Can you tell me how often
replacing them? Is this something you do

every month or every six months or --

A You check these wires often, and I
am not sure the length of time they last.

Q Okay. You weren't surprised to see they needed to be replaced?

A No, sir.

Q Okay. Once you saw that, what did you decide to do?

A Contacted Bobby Jones and told him what the situation was, and he said to replace them.

Q Okay. And is this a big job?

A Yes, sir.

Q Does it require shutting down the dumpers?

A Yes, sir.

Q Okay. Was the dumper shut down during this time?

A Yes, sir.

Q There wasn't any coal being loaded?

A No, sir.

Q. Okay, you haven't mentioned to

me they needed to be registered?

A. Not at all.

Q. Okay. Once you saw that, would

did you decide to do?

A. I contacted Bobby Jones and told

him that the situation was, and he said to

register them.

Q. Okay, and is this a very good

A. Yes, sir.

Q. Does it require anything from the

company?

A. Yes, sir.

Q. Okay. Was the design that down

during this time?

A. Yes, sir.

Q. There wasn't any cost, being

loaded?

A. No, sir.

Q That is when y'all do the maintenance on the dumpers is when it's down like that?

A Yes, sir.

Q Okay. What does the -- tell me a little bit about how you go about replacing these things.

A You have to have an acetylene and oxygen torch, and you take the pins, which are actually bolts, out of the linkage, and you heat up the keeper strap that is over top of one of the pins, that is a pin, not a bolt. You bend it out of the way, and you take the pin out, and usually or supposedly that is all that has to be done. You take the pin out and take the sword out.

On this particular day the bushing that the pin goes through was broke, and I had to take the acetylene and oxygen torch and push the bushing block off. Then

Q That is when you'll find the
main entrance to the garage is down
like that.

A Yes sir.
Q Okay. What does the - tell me a
little bit about how you got around reflecting
these things.

A You have to have an acetylene and
oxygen torch, and you take the pipe, which
are actually bolts, one of the linkage, and
you fasten up the burner stick. That is over
top of one of the pipe. This is a pin, not a
bolt. You bend it out of the way, and you
take the pin out, and usually, or supposedly
that is all that has to be done. You take
the pin out and take the second one.

On this particular day the
beaching that was done through was made,
and I had to take the acetylene and oxygen
torch and heat the beaching block off. Then

I had to go back to the shop and get a new bushing block and new pin and come back to the dumper to replace it.

Q Okay. How much time did it take place? It is getting close to noon?

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY
OF NORFOLK

ROBERT T. GOODE, JR.,

Plaintiff,

v.

AT LAW NO. L86-355

NORFOLK AND WESTERN
RAILWAY COMPANY,.

EXHIBIT D3
/s/ JWW
Judge

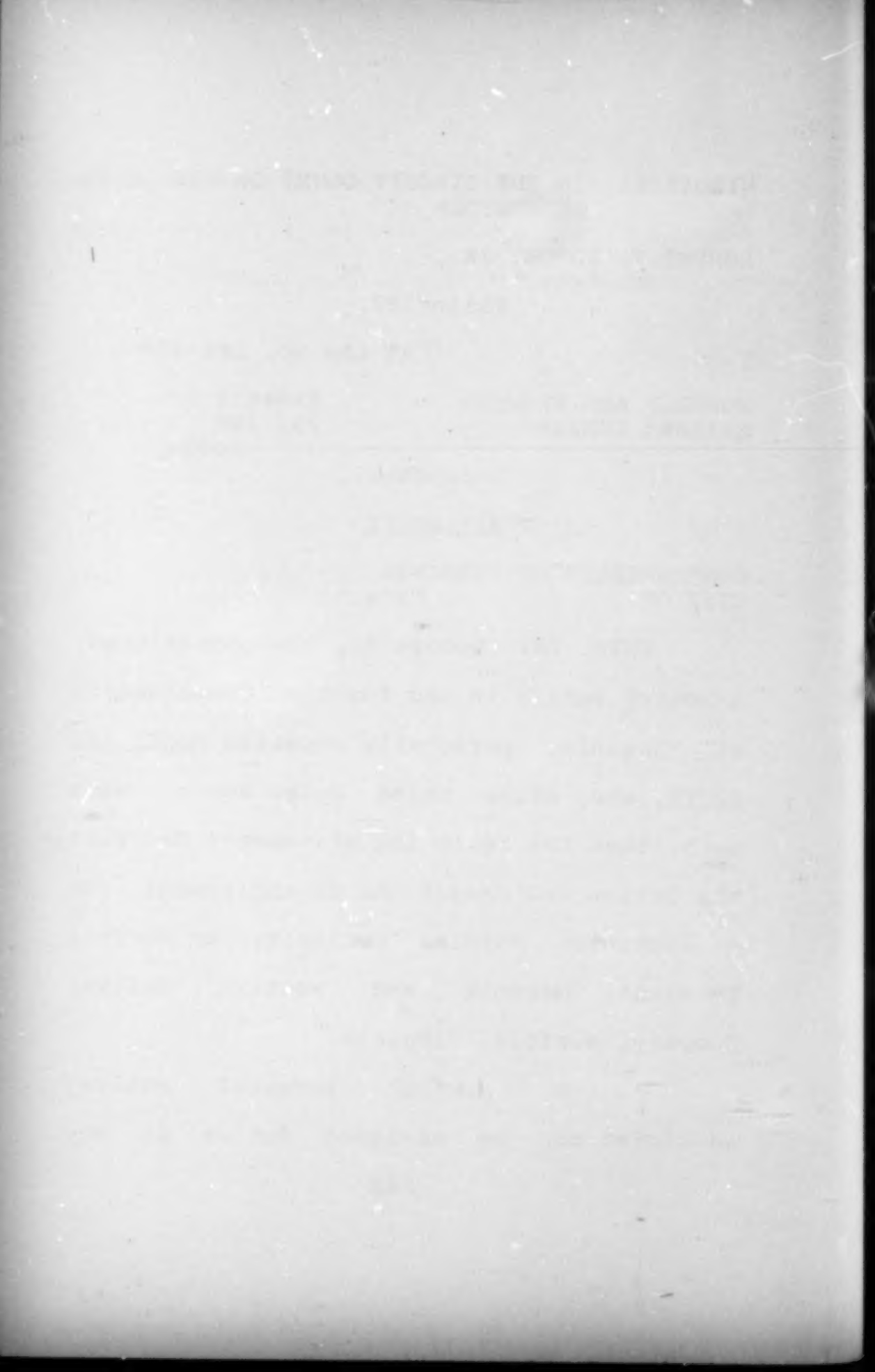
Defendant.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA
CITY OF , to-wit:

THIS DAY, before me, the undersigned,
a Notary Public in and for the Commonwealth
of Virginia, personally appeared RONEL LEE
CROFT, who, after being duly sworn, made
oath that the following statements describe
the duties and conditions of employment for
a machinist holding seniority on Norfolk
Terminal, Norfolk and Western Railway
Company, Norfolk, Virginia.

1. A Norfolk Terminal railway
machinist may be assigned duties at any



geographical point on the Terminal. As an example, machinists work at Portlock Yard (approximately 6 miles from Lamberts Point Yard).

2. All machinists on Norfolk Terminal work from a common seniority list and may change jobs at will, based on their seniority standing on this last.

3. Machinists perform jobs on Norfolk Terminal ranging from the repair and maintenance of pier machinery; to the repair and maintenance of railroad locomotives; to the repair of railroad cars; to the repair of hydraulic braking systems; to the repair of bridge raising mechanisms.

4. Norfolk Terminal machinists perform these duties at various geographic locations ranging from the Elizabeth River Piers, the 38th Street car shops and the locomotive round house, all at Lamberts

geographical point on the terrain. In an
example, the distance from the London
regionally - 6 miles from London - is
about 12.

1. The distance from the London
regionally with the same boundary line
and the change in the area based on the
boundary is shown in this list.

2. The distance from the London
regionally with the same boundary and
maintenance of the boundary to the south
and maintenance of the boundary to the north
The region is divided into the north
of the region is shown in the north
of the region is shown in the north

3. The distance from the London
regionally with the same boundary
location shown from the London
The distance from the London
regionally with the same boundary

Point Yard; to Portlock Yard (approximately 5 miles from Lamberts Point Yard); to Bridge #7 (approximately 7 miles from Lamberts Point Yard); to Crewe, Virginia (approximately 125 miles from Lamberts Point yard).

5. Machinists assigned to the Motive Power Department at the Pier end of Lamberts Point Yard have job assignments of working on Pier machinery, both over the water and in the shop; also, work assignments involved with railroad cars and railroad equipment, prior to the unloading of the cars.

Examples of some of these assignments:

- a. the repair of railroad cars;
- b. the rerailing of derailed railroad cars;
- c. the repair and maintenance of pushers (small electric locomotives);
- d. the repair and maintenance of the Barney;
- e. the repair and maintenance of retarders; and
- f. the release of handbrakes on railroad cars.

Point Yard to Portico Yard (approximately 2 miles from Lancaster Point Yard); to Portico Yard (approximately 2 miles from Lancaster Point Yard); to Cross, Virginia (approximately 122 miles from Lancaster Point Yard).

1. Work orders assigned to the motive power department at the time and of Lancaster Point Yard have job assignments of work on flat machinery, both over the water and in the shop when work assignments involved with railroad cars and related equipment.

2. The assignment of the work order to the maintenance of the cars.

3. Examples of work of these assignments:

- a. The repair of railroad cars.
- b. The detailing of detailed railroad cars.
- c. The repair and maintenance of electric (small electric locomotives).
- d. The repair and maintenance of the locomotives.
- e. The repair and maintenance of the locomotives and related equipment.
- f. The repair of locomotives on railroad cars.

6. Retarders, such as those in use on the south side dumper at Lamberts Point Yard, are in use throughout the Norfolk and Western Railroad system and are common to all railroads.

7. The purpose and function of such retarders is to stop railroad cars.

8. The function of the retarders on the south side dumper is to stop railroad cars prior to the cars being unloaded.

9. The conveyor belt system used to load coal on ships begins after the unloading of railroad cars at the southside dumper.

10. After a car is unloaded it continues its cycle back to the coal mines to be loaded again, by continuing up a raised track, and is then returned by gravity to an empty car yard.

1. The purpose and function of the
the south side of the river at
yard, the in the vicinity of the
Western Railroad station and the
all buildings.

2. The purpose and function of the
the south side of the river at
the south side of the river at
the south side of the river at
the south side of the river at

3. The purpose and function of the
the south side of the river at
the south side of the river at
the south side of the river at
the south side of the river at

4. The purpose and function of the
the south side of the river at
the south side of the river at
the south side of the river at
the south side of the river at

11. Different crafts of employees work beside the track on which the south side retarder is located. As an example, railroad brakemen work beside this track, and they are geographically closer to the water and piers than is a machinist working on a retarder.

12. Machinists working on the pier end of the yard are worked side by side, over land, with railway maintenance of way employees:

- a. rerailing derailed railroad cars;
- b. breaking up frozen coal from railroad cars.

13. As a railroad machinst I am required to pay money to the Federal Retirement Board.

14. As a railroad machinist I am eligible for retirement under the Federal Railroad Retirement system.

15. As a railroad machinist I am eligible to receive Railroad Retirement Board unemployment benefits when furloughed or dismissed from this job.

16. As a railroad machinist I am eligible to receive Railroad Retirement Board sickness benefits when I miss time from work due to illness or a disabling injury at home.

17. My work contract is negotiated under the Federal Railway Labor Act.

18. My rights to hearings, and appeals rights of discipline imposed by the Norfolk and Western Railroad, are rights under the Federal Railway Labor Act.

19. The railroad cars repairs by the machinists are used in interstate commerce.

20. The safety standards for railroad cars stopped by the retarders on the south

side, Pier 6, are set by Federal regulations, the Safety Appliance Act.

21. A machinist's work on Norfolk Terminal, with the exception of work on machinery that handles coal after the coal cars are unloaded, is in no way even remotely related to the loading or unloading of ships, nor is this work on piers, nor is this work over water. This work deals with machinery used in the repair of coal cars, the repair of locomotives, vehicles, bridges and track machinery such as retarders.

/s/ Ronel Lee Croft

Sworn and subscribed to before me, in the City of Norfolk, State of Virginia, this 11th day of September, 1986.

/s/ Martha Early

My commission expires: 10-10-88

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY
OF NORFOLK

ROBERT T. GOODE, JR.,

Plaintiff,

v.

AT LAW NO. L86-355

NORFOLK AND WESTERN
RAILWAY COMPANY,.

EXHIBIT D4

/s/ JWW

Judge

Defendant.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA
CITY OF , to-wit:

THIS DAY, before me, the undersigned,
a Notary Public in and for the Commonwealth
of Virginia, personally appeared Raymond D.
Wethington, who, after being duly sworn,
made oath that the following statements
describe the duties and conditions of
employment for a machinist holding seniority
on Norfolk Terminal, Norfolk and Western
Railway Company, Norfolk, Virginia.

1. A Norfolk Terminal railway
machinist may be assigned duties at any

RECEIVED BY THE DIRECTOR OF THE BUREAU OF THE ARMY

OFFICE OF THE ADJUTANT GENERAL

WASHINGTON, D. C.

SEPTEMBER 1, 1917

TO THE SECRETARY OF THE ARMY

FROM THE ADJUTANT GENERAL

SUBJECT: [Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]

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[Illegible]

[Illegible]

[Illegible]

[Illegible]

geographical point on the Terminal. As an example, machinists work at Portlock Yard (approximately 6 miles from Lamberts Point Yard).

2. All machinists on Norfolk Terminal work from a common seniority list and may change jobs at will, based on their seniority standing on this list.

3. Machinists perform jobs on Norfolk Terminal ranging from the repair and maintenance of pier machinery; to the repair and maintenance of railroad locomotives; to the repair of railroad cars; to the repair of hydraulic braking systems; to the repair of bridge raising mechanisms.

4. Norfolk Terminal machinists perform these duties at various geographic locations ranging from the Elizabeth River Piers, the 38th Street car shops and the locomotive round house, all at Lamberts

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Point Yard; to Portlock Yard (approximately 5 miles from Lamberts Point Yard); to Bridge #7 (approximately 7 miles from Lamberts Point Yard); to Crewe, Virginia (approximately 125 miles from Lamberts Point yard).

5. Machinists assigned to the Motive Power Department at the Pier end of Lamberts Point Yard have job assignments of working on Pier machinery, both over the water and in the shop; also, work assignments involved with railroad cars and railroad equipment, prior to the unloading of the cars.

Examples of some of these assignments:

- a. the repair of railroad cars;
- b. the rerailing of derailed railroad cars;
- c. the repair and maintenance of pushers (small electric locomotives);
- d. the repair and maintenance of the Barney;
- e. the repair and maintenance of retarders; and
- f. the release of handbrakes on railroad cars.

6. Retarders, such as those in use on the south side dumper at Lamberts Point Yard, are in use throughout the Norfolk and Western Railroad system and are common to all railroads.

7. The purpose and function of such retarders is to stop railroad cars.

8. The function of the retarders on the south side dumper is to stop railroad cars prior to the cars being unloaded.

9. The conveyor belt system used to load coal on ships begins after the unloading of railroad cars at the southside dumper.

10. After a car is unloaded it continues its cycle back to the coal mines to be loaded again, by continuing up a raised track, and is then returned by gravity to an empty car yard.

2. The purpose of the test is to determine the effect of the test on the system. The test is to be conducted in a controlled environment. The test is to be conducted in a controlled environment. The test is to be conducted in a controlled environment.

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7. The purpose of the test is to determine the effect of the test on the system. The test is to be conducted in a controlled environment. The test is to be conducted in a controlled environment. The test is to be conducted in a controlled environment.

11. Different crafts of employees work beside the track on which the south side retarder is located. As an example, railroad brakemen work beside this track, and they are geographically closer to the water and piers than is a machinist working on a retarder.

12. Machinists working on the pier end of the yard are worked side by side, over land, with railway maintenance of way employees:

- a. rerailing derailed railroad cars;
- b. breaking up frozen coal from railroad cars.

13. As a railroad machinist I am required to pay money to the Federal Retirement Board.

14. As a railroad machinist I am eligible for retirement under the Federal Railroad Retirement system.

11. Station master at
work beside the track on which the south
side carter is located. As an engine
reached between work beside this track
and they are geographically closer to the
water and pier than is a machine working
on a tender.

12. Machine working on the pier
end of the yard are worked side by side
over land, with railway maintenance of way
equipment.

13. Detailing detailer
working on frozen track
collected data.

14. A railroad machine
required to pay money to the Federal

Equipment Board.

15. As a railroad machine

eligible for retirement under the railroad

retirement system.

15. As a railroad machinist I am eligible to receive Railroad Retirement Board unemployment benefits when furloughed or dismissed from this job.

16. As a railroad machinist I am eligible to receive Railroad Retirement Board sickness benefits when I miss time from work due to illness or a disabling injury at home.

17. My work contract is negotiated under the Federal Railway Labor Act.

18. My rights to hearings, and appeals rights of discipline imposed by the Norfolk and Western Railroad, are rights under the Federal Railway Labor Act.

19. The railroad cars repairs by the machinists are used in interstate commerce.

20. The safety standards for railroad cars stopped by the retarders on the south

11. As a railroad employee, I am eligible to receive Railroad Retirement Board unemployment benefits when discharged or dismissed from this job.

12. As a railroad employee, I am eligible to receive Railroad Retirement Board sickness benefits when I am sick and unable to perform my duties or a disabling injury at home.

13. My work contract is negotiated under the Federal Railway Labor Act.

14. My rights to benefits and appeals rights of discipline imposed by the Norfolk and Western Railroad are rights under the Federal Railway Labor Act.

15. The railroad does register by the National Labor Relations Board.

16. The safety standards for railroad employees are based on industry standards.

17. The safety standards for railroad employees are based on the standards set by the Interstate Commerce Commission.

side, Pier 6, are set by Federal regulations, the Safety Appliance Act.

21. A machinist's work on Norfolk Terminal, with the exception of work on machinery that handles coal after the coal cars are unloaded, is in no way even remotely related to the loading or unloading of ships, nor is this work on piers, nor is this work over water. This work deals with machinery used in the repair of coal cars, the repair of locomotives, vehicles, bridges and track machinery such as retarders.

In addition to the above, I attest that as Local Chairman (Labor Representative) representing machinists on Norfolk Terminal, the following:

A. I progress discipline appeals to my General Chairman through the Federal Railway Act.

side, Pier 5, and by Federal
regulations, the Entry Appliance Act.
21. A machine's work on Norfolk
Terminal, with the exception of work on
machinery that handles coal after the coal
has been unloaded, is in no way
remotely related to the loading or unloading
of ships, nor is this work on piers, nor is
this work over water. This work deals with
machinery used in the repair of coal cars,
the repair of locomotives, vehicles, bridges
and track machinery such as switches.
In addition to the above, it is noted
that an _____ Chairman _____
Representative _____ representing machinery on
Norfolk Terminal, the following:
A. I propose discipline apply to
my General Chairman through the Federal
Railway Act.

B. All benefits such as unemployment and sickness benefits are payable through the Federal Railway Retirement Board.

C. All machinists on Norfolk Terminal that I represent are treated as railway employees, except when one is injured at the east end of Lamberts Point Yard (the River End).

D. All machinists, in all parts of the Terminal, work under work rules set by the Railroad for all railroad employees. Also, they all work under safety rules set by the Railroad for all railroad employees on all parts of the Railroad system.

/s/ Raymond D. Wethington

Sworn and subscribed to before me, in the City of Norfolk, State of Virginia, this 3rd day of September, 1986.

/s/ Martha Early

My commission expires: 10-10-88

HERBERT R. CROWDER, called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

CROSS EXAMINATION

BY MR. WILSON:

THE COURT: Well, they ride it only for the purpose of hitching a ride? Why would they do that?

THE WITNESS: When a car that has been put on the dumper that's misclassified -- there are hundreds of classes of coal -- and they have to get it off, or we have a mechanical breakdown that we can't dump that car and have to get rid of it so we can repair it at the facility. So I can't say that it never happens, but it's so remote that I can't

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remember the last time it was done.

BY MR. WILSON:

Q. But you do agree that a trainman is customarily working in an area closer to the water than this retarder that you were speaking about; is that correct?

A. He's assigned to work closer to the water than the retarders, yes.

Q. What is his job?

A. That trainman?

Q. Yes, sir.

A. he ensures that the cars got off the dumper and he classifies cars as they come off the dumper. A for instance, if you may, is we classify cars coming off the dumper between 100-ton and a 70-ton car and different railroad's ownership.

BY MR. WILSON:

...the last time it was done

BY MR. WILSON:

Q. Now, you do agree that a person
is necessarily working in an office when
the work, even this evidence that you were
appearing around the office?

A. He's entitled to work when he
is there when the evidence is there.

Q. What is his job?

A. That position.

Q. Now, all

A. He states that he was not off
the duplex and he was not there at that
time off the duplex. At the same time, if you
say, is not directly into work with the
duplex, then you are not a 100% and
different evidence's evidence.

BY MR. WILSON:

Q. What does BC stand for?

A. From B belt to C belt.

Q. It's a belt change house; is that what it is?

A. Yes, sir. You don't change belts, so that we are talking the same terms. It's where the coal transfers from one belt to another belt.

Q. Okay. If you will, why don't you draw a circle now where the dumper operation is where the coal is dumped from the car at the retarders.

A. (The witness complied.)

Q. All right. And what are these lines that run between these two red circles?

A. That's your B belt. B and 1 belt.

THE COURT: Underground, aren't they?

Q. What does he mean by that?

A. From E back to D.

Q. Is it a back change again, is that

what it is?

A. Yes, Sir. You don't change

points, we just we are talking the same

terms. It's where the real fixations from

one point to another point.

Q. Okay. Is that all, are there any

more points now where the danger operation

is where the cost is changed from one car to

the next one.

A. (The witness replied.)

Q. All right. And what are these

places that you between them, are they

clear?

A. There's your A, B, C, D, and E.

Q. All right.

A. Yes, Sir.

Q. All right.

A. Yes, Sir.

Q. All right.

A. Yes, Sir.

Q. All right.

THE WITNESS: Partially
underground and partially above.

BY MR. WILSON:

Q. If you will, why don't you draw
an arrow between those two circles for us.

A. (The witness complied.)

Q. Now show me where the coal goes
when it changes from one belt at the BC
house onto another belt.

A. (The witness complied.)

Q. And what is its final destination
there?

DILLARD BATES, called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

CROSS-EXAMINATION

BY MR. WILSON:

Q. Allright, sir. Don't they work on a device called a pusher, which has been described as a small electric locomotive, prior to the unloading of the cars?

A. Yes. The pusher at the barney piers, yes.

Q. Don't they work on the repair and maintenance of the barney which is a device used to push the cars up the incline before the dumper?

A. Yes, they do.

WILLIAM LAYNE, called as a witness by
and on behalf of the defendant, having been
first duly sworn, was examined and testified
as follows:

CHIEF EXAMINATION

BY MR. WILSON:

Q All right, sir. Don't they work
on a device called a buzzer, which has been
described as a small electric device,
refer to the unloading of the cars?

A Yes, the buzzer is the device
which, yes.

Q Don't they work on the buzzer and
assistance of the buzzer which is a device
used to push the cars up the incline before
the buzzer?

A Yes, they do.

Q. Don't the trainmen activate the barney, railroad trainmen?

A. No, sir. The railroad trainmen gives our dumper operators a signal that it is ready to pull and he actually pushes the button to pull the barney.

Q. So they participate in the process of signalling which causes the barney to be started?

A. Right. They have a green light down there. When he takes the retarders off a green light comes on. Then the barney comes.

Q. So machinists do work in and about railroad cars with the movement of railroad cars both before and after they are dumped?

A. Yes.

Q. We have discussed a place called the BC house.

Q. Now the witness, relative to
the witness, witness
A. Yes, sir. The witness
gives me, witness operates a signal
is ready to pull and he actually pushes
button to pull the train.
Q. So they participate in
process of signaling which causes
train to be started?
A. Right. They have a green light
down there. When he takes the signal
a green light comes on. Then the train
comes.
Q. So according to what is
about railroad cars with the movement
railroad cars both before and after they
depart.
A. Yes.
Q. We have discussed a place called
the 10 miles.

A. Yes.

Q. And I understand that there are belts that run from the south side dumper to this BC house?

A. Yes.

Q. Does that belt have a designation?

A. The BC house?

Q. No. The belt itself. It is like B belt?

A. Yes. B and B1 belt, yes.

Q. So B belt goes from the south side dumper to the BC house?

A. Under normal operations, yes.

Q. And then the coal is dumped on another belt that goes from the BC house to the ships; is that correct?

A. That's correct.

Q. What is the designation of that belt from the ships to the BC house?

A. From the ship to the BC house?
Under normal operation, B belt would dump onto C belt. C belt would go down the pier, up through the loader.

Q. And that is when they put the coal in the ships, right?

A. No, sir. It then dumps onto D belt.

Q. So there is another belt involved?

A. Which is a belt going across out to your apron. It belts onto E belt.

Q. Is there a shoot at the back of the BC house where you can place coal?

A. There's a shoot at the back of the BC house?

Q. At the back of the BC house.

A. Yes. There is a cleanup place back there where the cleanup belts dump off and also a place back there where if you

A. From the ship to the B house
under normal conditions, the belt would
onto E level. The belt would go down the stairs
up through the ladder.

Q. And that is when they put the
coal in the bridge, right?

A. Yes, sir. It then drops onto B
level.

Q. So there is another "belt"
involved?

A. Which is a belt going across and
to your right. It falls onto E level.

Q. Is there a shoot at the back of
the B house where you can place coal?

A. There's a shoot at the back of
the B house.

Q. At the back of the B house.

A. Yes, there is a shoot which
falls into the B house. There's also a place back there where it
falls into the B house.

have a problem with your belt, if we ever do reverse it, it could dump it out on the ground, yes, sir.

Q. So you could actually take the coal after it's left B belt and going onto C belt and you can reverse C belt and dump coal back out through the BC house; is that correct?

A. That is not done except in special emergency cases. It cannot be just normally reversed.

Q. My questions is can you do that.

A. It could on special conditions.

Q. Has it ever been done?

A. I have done it when I have come over a belt with a rip.

Q. Couldn't you take that coal you dumped over the shoot and load it in the railroad cars?

have a problem with your belt. If we ever do
reverse it, it could keep it out on the
ground, yes, sir.

Q. So you could actually take the
coat after it's left a belt and going onto
belt and you can reverse C belt and that
coat back out through the B house, is that
correct?

A. That is not done except in
special emergency cases. It cannot be done
normally reversed.

Q. If question is can you do that?

A. It could on special conditions.

Q. Has it ever been done?

A. I have done it when I have come

over a belt with a tip.

Q. Would you say that over, you

dumped over the wheel and then it is the
reversed directly.

A. Yes.

Q. As a matter of fact, there's a track that runs right down beside the BC house?

A. Yes.

Q. And there are railroad cars sitting back there most of the time, isn't there?

A. Right.

Q. And they've got coal in them, don't they?

A. Yes, sir.

Q. And that coal is coal that came out of the railroad cars up on the dumper, isn't it.

A. It's cleaned up coal, yes. It came from all over the piers.

Q. And retarders are used to stop cars, aren't they?

A. Yes.
Q. As a matter of fact, Claret's
train was four times down beside the
house?
A. Yes.
Q. And there are railroad cars
sitting back there west of the house, aren't
there?
A. Right.
Q. And they've got coal in them,
don't they?
A. Yes, sir.
Q. And that coal is coal that came
out of the railroad cars up on the bridge,
isn't it?
A. It's a mixture of coal, yes, it
came from all over the place.
Q. And railroads are used to ship
coal, aren't they?

A. Yes.

Q. And they are used all over the railroad system to stop cars, aren't they?

A. Yes.

MR. WILSON: That's all the questions I have, Your Honor. Thank you.

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE

NORFOLK AND WESTERN RAILWAY COMPANY, PETITIONER

v.

ROBERT T. GOODE, JR.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether "employee[s]" engaged in "maritime employment" under Section 2(j) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 902(3), include not only those workers who actually load or unload cargo but also all workers on a covered site who perform work that is an essential element or integral part of the process of loading or unloading.



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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1979

CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE

No. 88-127

NORFOLK AND WESTERN RAILWAY COMPANY, PETITIONER

v.

ROBERT T. GOODE, JR.

*ON PETITIONS FOR WRITS OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners, Chesapeake and Ohio Railway Company (C&O) and Norfolk and Western Railway Company (N&W), operate coal loading terminals in the Hampton Roads area of Virginia. C&O's terminal abuts the James River (87-1979 Pet. 7), while N&W's facility, known as Lambert's Point, adjoins the Elizabeth River (88-127 Pet. 7). Petitioners' freight trains transport coal mined inland for loading onto ships docked at the terminals' piers. Upon arrival, the coal-laden railway cars re-

main in the terminals' "barney" yards until the shiploading process begins. Pet. App. 8A-9A, 46A.¹

The process of loading coal into ships' holds is highly mechanized and, in all material respects, identical at both petitioners' terminals. When shiploading begins, railway cars move one-by-one from the barney yards and onto "dumpers" at the land end of the piers. A mechanical device called a "retarder" stops each loaded coal car at the correct position on the dumper. Next, other mechanical devices lift and rotate the car, so that its contents drop through a hopper to conveyor belts that feed the coal directly onto the waiting ships. After unloading, the cars roll back to the terminals' holding yards, from which they are eventually sent inland. Barring mechanical failure or other incident, the coal loading process is continuous from the time a car leaves the barney yard until it returns, empty, to the holding yard. Pet. App. 3A-4A, 46A-48A; 87-1979 Pet. 7-9; 88-127 Pet. 8-9.

The respondents in No. 87-1979, Nancy J. Schwalb and William McGlone, were laborers employed by C&O to perform general cleaning at its terminal. Though each had varied duties, they both were frequently required, during the actual shiploading process, to clear away coal that spilled from the conveyor belts and the "trunnion rollers," the devices at the ends of the dumper that enable it to rotate suspended railway cars. Failure to clear away this "trash coal" results in malfunction of the shiploading equipment, thus halting the loading process. Pet. App. 3A-4A, 20A-21A, 23A-24A; 87-1979 Pet. 9. While Schwalb and McGlone easily could have replaced the trash coal on the conveyor belts, applicable union agreements prohibited them from doing so; rather, laborers from a different department performed that task (Pet. App. 4A; 87-1979 Pet. 9-10; 87-1979 Br. in Opp. 5).

The respondent in No. 88-127, Robert J. Goode, Jr., was a machinist for N&W who worked in the Motive Power Depart-

¹ The contents of the appendices to the petitions in each case are essentially identical, except for their order. Therefore, for ease of reference, we refer only to the Appendix in No. 87-1979, cited as "Pet. App."

ment at Lambert's Point.² That department's function was to maintain and operate the coal facility, with machinists in the Department devoting the majority of their time to maintaining and repairing loading equipment and machines. Pet. App. 47A-49A, 52A.

Schwalb sustained a serious head injury on January 11, 1983, when she fell while walking to clear trash coal from the trunnion rollers (87-1979 Pet. 10-11; 87-19/9 Br. in Opp. 2). McGlone was injured on February 1, 1983, as he was attempting to clear away trash coal beneath a moving conveyor belt (87-1979 Pet. 10; 87-1979 Br. in Opp. 3). Goode was injured on February 11, 1985, while repairing the retarder located on one of the dumpers at Lambert's Point (88-127 Pet. 9-10; 88-127 Br. in Opp. 2-3). Each respondent brought a timely action under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, in the appropriate circuit court of the State of Virginia (Pet. App. 2A, 88-127 Br. in Opp. 2). C&O filed special pleas to the courts' jurisdiction, contending that the respondents' exclusive remedy was under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*³ N&W moved to dismiss on the same basis. Pet. App. 19A, 23A, 45A.

2. The courts for the Third Judicial Circuit (*McGlone*), Fourth Judicial Circuit (*Goode*), and Seventh Judicial Circuit (*Schwalb*) of Virginia each decided that the LHWCA applied to respondents' claims, sustained petitioners' jurisdictional challenges, and dismissed the FELA actions (Pet. App. 31A-34A, 45A). In each case, the court found no serious dispute that the respondents satisfied the LHWCA's "situs" requirement by working in a statutorily covered geographical area (Pet. App. 20A, 24A-25A, 56A), and thus focused principally on whether

² N&W employs machinists throughout its rail system, assigning them to different sites and different jobs on the basis of seniority (Pet. App. 48A-49A; 88-127 Br. in Opp. 5-6).

³ The Longshoremen's and Harbor Workers' Compensation Act was re-titled by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. 98-426, § 27(d)(1), 98 Stat. 1654.

the respondents were "employee[s]" as defined by Section 2(3) of the Act, 33 U.S.C. 902(3) (1982 & Supp. IV 1986).

In resolving this issue of employee status, the circuit courts in the *McGlone* and *Goode* cases explicitly acknowledged a conflict between the restrictive approach to the question that the Virginia Supreme Court followed in *White v. Norfolk & W. Ry.*, 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977), and the more expansive standard adopted by the federal courts of appeals in such decisions as *Price v. Norfolk & W. Ry.*, 618 F.2d 1059 (4th Cir. 1980) (Pet. App. 25A-29A, 53A). The courts viewed the Virginia Supreme Court's *White* standard as confining LHWCA coverage to those workers on the situs who were "directly involved" in the loading of cargo (*id.* at 26A, 52A-53A). By contrast, the courts believed, the prevailing standard among the federal courts of appeals is considerably broader, encompassing all workers on the situs whose jobs comprise "an essential element in the loading and unloading of the vessels" (*id.* at 27A-28A, 54A). As the *McGlone* court interpreted it, the federal standard does not require an employee to be involved "in the actual loading of ships," if the maintenance work the employee performed "was essential to the movement of maritime cargo" (*id.* at 27A). The *McGlone* and *Goode* courts resolved this conflict between state and federal court interpretations against adherence to the Virginia Supreme Court's test; in their view, following *White* "would be to interpret a Federal law contrary to all of the decisions of the Federal courts" (*id.* at 28A), and the test formulated by the federal courts was, in fact, the proper test (*id.* at 53A-54A).

Applying the federal courts' status test, the Virginia circuit courts concluded that the LHWCA covered the respondents because they performed tasks essential to the loading of coal at petitioners' terminals. *McGlone's* cleaning duties were essential because the failure to clear away coal that had fallen from the belts "would eventually interfere with the loading operation and bring it to a halt" (Pet. App. 24A). Similarly, *Schwalb's* cleaning duties conferred LHWCA coverage because "if the spilled coal was not removed * * * it could have halted [*sic*] the process of

loading the coal aboard the vessels" (*id.* at 21A). And Goode was an employee under the LHWCA because he maintained and repaired equipment and machines "directly and solely related to the loading and unloading operation" (*id.* at 52A), and was thus "involved in the essential elements of loading and unloading" (*id.* at 51A, citing *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985)).⁴

3. The Supreme Court of Virginia consolidated Schwalb's and McGlone's appeals and reversed (Pet. App. 1A-18A). Although acknowledging that the United States Court of Appeals for the Fourth Circuit had applied the LHWCA to a painter who did not actually handle cargo but who had maintenance duties essential to the "entire [loading] process" (*id.* at 12A (quoting *Price*, 618 F.2d at 1062 n.4)), and agreeing here that the failure to remove "trash coal" could interrupt that process (Pet. App. 4A), the Virginia court rejected the *Price* court's reasoning and conclusion (*id.* at 12A, 16A-17A), refused to adopt the "overall process" standard and adhered, instead, to the restrictive test set out in *White* (*id.* at 16A-17A). Under that test, the court held, workers must show that their "'own work and employment'" bears "'a realistically significant relationship' to 'traditional maritime activity involving navigation and commerce on navigable waters,'" to bring themselves within the LHWCA (*id.* at 10A-11A, quoting *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976)). Reading this Court's "essential elements of [loading or] unloading" language in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), to limit LHWCA coverage only to those employees actually "engaged in the handling of cargo" (Pet. App. 14A (quoting 432 U.S. at 267)), the Virginia Supreme Court concluded that "the [*Northeast Marine Terminal*] 'essential elements' standard is more nearly akin to the [*White*] 'significant relationship' standard * * * than the 'overall

⁴ The circuit court in *Goode*, explicitly concluding that the federal standard should prevail over the state's *White* standard to the extent that the standards differed, nevertheless held that the activities of Goode qualified him for coverage under the *White* test as well (Pet. App. 53A).

process' construction" (Pet. App. at 16A). Without considering how essential their duties were to the overall loading process, the court held that since Schwalb and McGlone performed "purely housekeeping and janitorial tasks," they "were not statutory employees as defined in the LHWCA" (*id.* at 17A). Application of the *White* test thus required reversal of the circuit courts' judgments. Subsequently, relying on its opinion in *Schwalb*, the Virginia Supreme Court reversed the judgment in *Goode* as well (Pet. App. 58A-59A).³

DISCUSSION

These cases present this Court with an excellent opportunity to examine the scope of landward coverage under the "status" provision of the 1972 amendments to the Longshore and Harbor Workers' Compensation Act. The Court has faced the question twice before, see *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), each time finding the employees covered because "they were 'engaged in longshoring operations,' and thus fit one of the categories explicitly enumerated by Congress as part of 'maritime employment.' " *Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297, 318 n.27 (1983). As the Court has recognized (*ibid.*), in neither case did it determine that the concept of "maritime employment" required "an examination into whether the employment had a 'direct' or 'significant relationship to navigation or commerce.' "

³ The Court did not consider, as an independent ground on which it could sustain the lower court's holding, the fact that Goode's duties as a pier mechanic at times involved work "over the water" (88-127 Br. in Opp. 6; 88-127 Pet. App. 26A, 33A), and that such work therefore may have qualified Goode as a covered employee under *Northeast Marine Terminal*, 432 U.S. at 273 (post-1972 LHWCA meant to cover "amphibious workers" or those who spent "at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity") and *Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297, 311-312 (1983) (workers injured on navigable waters before 1972 covered under LHWCA without regard to duties performed; post-1972 Act covers all previously covered).

The Supreme Court of Virginia has attempted to create a "significant relationship" test here, one that is severely limited in scope. The Virginia court's decisions in *White* and the instant cases make that limitation clear: the court's test essentially requires workers claiming coverage because of stevedoring or similar activities to demonstrate that they are actually loading or unloading maritime cargo (either by physically handling the cargo or by manipulating machinery used for that purpose) in order to bring themselves within the LHWCA's ambit. This test conflicts with the expansive interpretation of the LHWCA's status provision suggested by its statutory language and legislative history, accorded that provision by this Court, and uniformly applied by the federal courts of appeals, the Department of Labor, and the Benefits Review Board (BRB). The conflict creates uncertainty over the proper test for employment status that invites forum-shopping among injured workers, implicates the Department of Labor's administration of the LHWCA program, and potentially impinges on the rights and interests of employers and employees alike.⁶ These results frustrate Congress's intent that "a simple, uniform standard of coverage" apply under the LHWCA. *Pfeiffer*, 444 U.S. at 83. Given the practical importance of the issue and the disagreement among the lower courts addressing it, review by this Court is warranted.

1. The language and legislative history of the 1972 amendments to the LHWCA indicate that a broad reading of the

⁶ In this case, because the FELA provides potentially lucrative, albeit uncertain, relief if the LHWCA does not cover respondents, a finding of no LHWCA coverage may well inure to their immediate financial benefit. The possible advantage presented by a "no LHWCA coverage" finding to these respondents, however, does not illuminate the inquiry into the scope of the LHWCA's status requirement. In numerous other situations, to preclude coverage of claimants who, like respondents, perform tasks integral to the loading and unloading process, would be to consign them to "the paucity of relief under state compensation laws." *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 723 (1980). That result would be plainly inconsistent with Congress's intent in its 1972 landward extension of the LHWCA, to alleviate the problem of inadequate state remedies (*ibid.*).

coverage provided by the statute is required. These amendments were intended to remedy several problems. First, Congress sought to eliminate circumvention of the LHWCA compensation system through resort to an action for unseaworthiness.⁷ See S. Rep. No. 1125, 92d Cong., 2d Sess. 1-2, 5-12 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1-8 (1972); *Perini*, 459 U.S. at 313; *Northeast Marine Terminal*, 432 U.S. at 260-261. In addition, Congress sought to expand the Act's scope; it wanted to remedy a coverage anomaly that limited longshore and harbor workers to recovering LHWCA benefits for work-related injuries sustained on navigable waters and left those who sustained similar injuries on the adjoining land without an LHWCA remedy. See S. Rep. No. 1125, *supra*, at 1, 12-13; H.R. Rep. No. 1441, *supra*, at 10-11; *Perini*, 459 U.S. at 306-312; *Northeast Marine Terminal*, 432 U.S. at 256-265; *Pfeiffer*, 444 U.S. at 72-73.

Congress effected the coverage change through two specific amendatory clauses. First, it modified the Act's "situs" requirement, expanding the definition of "navigable waters" under Section 3(a), 33 U.S.C. 903(a), to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel." *Northeast Marine Terminal*, 432 U.S. at 263. This case involves the second of the amendatory clauses, the new "status" requirement Congress added to Section 2(3), 33 U.S.C. 902(3), "to describe affirmatively the class of workers [it] desired to compensate." *Northeast Marine Terminal*, 432 U.S. at 264. Under the amended status test, LHWCA coverage extends to injured workers "en-

⁷ Prior to the 1972 amendments, a longshoreman or related worker could bring an unseaworthiness action for injury incurred on board a ship against the owner of that ship, and could do so even if the condition causing the injury had been the fault of the longshoreman or his employer. See, e.g., *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The shipowner could then recover the damages paid to the worker from that worker's employer under theories of express or implicit warranty of workmanlike performance. See, e.g., *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

gaged in maritime employment," including specifically "any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship-builder, and shipbreaker * * *." 33 U.S.C. 902(3).

Congress did not define "maritime employment," "longshoreman," or "longshoring operations" in either the Act or its legislative history. See *Northeast Marine Terminal*, 432 U.S. at 265.⁸ However, the broad language of the status test itself suggests that the courts should take "an expansive view of [its] extended coverage." *Id.* at 268.

The remedial purpose of the statute reflected in the legislative history further supports an expansive view of the Act's coverage. *Northeast Marine Terminal*, 432 U.S. at 268 (citing *Voris v. Eikel*, 346 U.S. 328, 333 (1953)). As chronicled by this Court (see 432 U.S. at 268-273), Congress decided to extend the coverage of the Act shoreward because of two main concerns. First, pre-1972 benefits under the LHWCA extended only to those longshore and harbor workers who were injured over navigable waters; injuries occurring on land were covered by state workers' compensation laws. The result was "a disparity in benefits payable * * * for the same type of injury depending on which side of the water's edge and in which State the accident occurs." S. Rep. No. 1125, *supra*, at 12; H.R. Rep. No. 1441, *supra*, at 10. Moreover, the disparity between federal benefits and generally lower state benefits was to widen after the passage of the federal benefit reforms contained in the 1972 amendments. S. Rep. No. 1125, *supra*, at 12-13; H.R. Rep. No. 1441, *supra*, at 10; *Pfeiffer*, 444 U.S. at 83; *Northeast Marine Terminal*, 432 U.S. at 262. Second, Congress recognized that the realities of modern shipping practices, including containerization and other technological innovations, had moved much of the longshoring work it wished to protect onto the land. S. Rep. No. 1125,

⁸ The Committee reports accompanying the Act posit only a single "typical example" of the new status requirement, which, though useful in identifying the outer bounds of coverage, clearly "does not speak to all situations." *Northeast Marine Terminal*, 432 U.S. at 266, 267.

supra, at 13; H.R. Rep. No. 1441, *supra*, at 10; *Northeast Marine Terminal*, 432 U.S. at 270.⁹

These concerns support a liberal construction of the Act's landward coverage—a construction that focuses on the *occupations* of those the Act seeks to protect instead of on the “fortuitous circumstance” of where they are injured (S. Rep. No. 1125, *supra*, at 13; H.R. Rep. No. 1441, *supra*, at 10; see *Pfeiffer*, 444 U.S. at 78-84; *Northeast Marine Terminal*, 432 U.S. at 272-273), and that makes allowance for changing technology (see *Northeast Marine Terminal*, 432 U.S. at 269-271). As this Court has articulated the functional approach of the status provision, all employees “involved in the essential elements of loading and unloading” meet the status requirement of the Act; employees are excluded if they are “‘not engaged in the overall process of loading or unloading.’” *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985) (quoting *Northeast Marine Terminal*, 432 U.S. at 267 (emphasis added)). Coverage thus extends to any worker “responsible for some portion of” the loading and unloading activity since he or she is “as much an integral part of the process * * * as a person who participates in the entire process.” *Pfeiffer*, 444 U.S. at 82-83.

In 1984, Congress amended the status provision “to reaffirm the purposes of the 1972 jurisdictional changes, and in that light * * * [to exclude] certain fairly identifiable employers and employees” who, although at work on a covered situs, lack “a sufficient nexus to maritime navigation and commerce.” S. Rep. No. 81, 98th Cong., 1st Sess. 25 (1983).¹⁰ The amended provision excludes only certain narrow categories of employees more tenuously connected to maritime work than those involved

⁹ The enormity of the change in the longshoring industry effected by containerization alone, and the difficulties that change engenders when it is necessary to identify “longshoring tasks” have been documented by this Court. See *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490 (1980) (concerning appropriate focus of work preservation agreement in longshoring industry under National Labor Relations Act).

¹⁰ The 1984 amendments and their history are directly relevant to the instant case involving respondent Goode, who was injured on February 11, 1985 (88-127 Br. in Opp. 7).

here,¹¹ but excludes them *only* if they are eligible for state workers' compensation programs. 33 U.S.C. 902(3) (Supp. IV 1986).¹² Moreover, Congress in 1984 indicated that it considered coverage of employees under the Act appropriate either "because of the nature of the work which they do, or the nature of the hazards to which they are exposed." H.R. Rep. No. 570, *supra*, at 4. This broad approach clearly includes workers facilitating a loading process, who are subject to the same harbor-side risks as those actually handling cargo.

Thus, both the language of the status provision and the purposes expressed by Congress in 1972 and 1984 support a broad, functional approach to the landward coverage of the LHWCA, rather than the restrictive standard applied by the Supreme Court of Virginia.

2. The state court's standard is also inconsistent with the principles of coverage enunciated by this Court and followed by the lower federal courts.

a. In *Northeast Marine Terminal Co. v. Caputo*, *supra*, this Court first determined the reach of LHWCA coverage under the status provision of the 1972 amendments. The case involved two employees, a "checker" (the worker responsible for checking and recording cargo as it is loaded or unloaded) and a longshoreman who at the time of injury was working as a "terminal laborer" helping to load already-discharged cargo into consignees' trucks. After reviewing the history of the LHWCA with attention to Congress's continued efforts to provide uniform

¹¹ The amendments exclude from coverage, *inter alia*, "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work; * * * [or] employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance)." 33 U.S.C. 902(3) (Supp. IV 1986). Even these carefully limited exclusions "are intended to be narrowly construed." H.R. Rep. No. 570, 98th Cong., 1st Sess. 5 (1983).

¹² In the words of the House Report, workers not protected by state programs would "*remain* under the coverage of the Longshore Act," to whatever extent they were already covered by the Act's broad definition of maritime employment. H.R. Rep. No. 570, 98th Cong., 1st Sess. 5 (1983) (emphasis added).

coverage to "amphibious workers" (432 U.S. at 256-265, 273), the Court concluded that the Act's status provision should be interpreted broadly and in functional terms. The Court held that the "checker" satisfied the status requirement because, although his longshoring functions had been somewhat changed by technology (the employee was checking the contents of a container on shore on the day of the accident), his work was "an integral part of the unloading process as altered by the advent of containerization." *Id.* at 271. The Court held that the "terminal laborer" also met the status requirement; since he spent some of his time in "indisputably longshoring operations" (*id.* at 273), the Act's "focus on occupations and its desire for uniformity" supported continuous coverage under the LHWCA (*id.* at 276).

The Court explicitly rejected restrictions that would have artificially curtailed its functional analysis. First, it denied that union membership should determine eligibility as a "longshoreman" under the Act, noting that "[t]he vagaries of union jurisdiction are unrelated to the purposes of the Act." *Northeast Marine Terminal*, 432 U.S. at 268 n.30. Second, the Court rejected a limitation not unlike that adopted by the Virginia court here. The Court held that the "point-of-rest" doctrine—according to which "stevedoring" was limited to loading or unloading operations seaward of the first "point of rest" on a pier or dock from which cargo is moved into vessels or removed for further transport ashore—was incompatible with the Act's objective of extending uniform coverage on an occupational basis. *Id.* at 275, 276.

This Court confirmed its expansive interpretation of the landward extension of coverage in *P.C. Pfeiffer v. Ford*, *supra*, where it found coverage for two workers, neither of whom loaded or unloaded material directly to or from boats.¹³ The Court

¹³ Ford was a "warehouseman" injured while fastening military vehicles (which had been unloaded from a vessel days before) to a railroad flatcar. He was prohibited from moving cargo either directly from a vessel to a point of rest in storage or to a railroad car, or directly from a shoreside point of rest onto a vessel, by union rules reserving such work for longshoremen. *Pfeiffer*, 444 U.S. at 71. Bryant was a "cotton header" injured while unloading cotton

rejected any resurrection of the artificial distinctions imposed by union labels or the point-of-rest theory (444 U.S. at 81-82) and also rejected the creation of similar restrictions by employer "assignment policies" (*id.* at 83). Rather, the Court focused on the "nature of the activity" to which a worker could be assigned: it noted that "[l]and-based workers who do not handle containerized cargo also may be engaged in loading, unloading, repairing, or building a vessel" because "[p]ersons moving cargo directly from ship to land transportation are engaged in maritime employment * * * [and one] responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process" *Id.* at 80, 82-83 (citation omitted); see also *Herb's Welding*, 470 U.S. at 423.

Consistently with the rationale of these decisions, the courts of appeals uniformly view the question of whether employees are "engaged in maritime employment" from a functional perspective, focusing on the nexus between a worker's actual duties and the overall process of loading and unloading cargo.¹⁴ This approach takes into account the reality of conventional longshoring operations: that maritime employment today is significantly affected by technology, job specialization, and the "vagaries of union jurisdiction." Thus, although using slightly varying terms, the courts of appeals have extended coverage under the Act to any employee on a covered situs whose actual duties comprise an "essential element" or "integral part" of the overall loading and unloading process, even if those duties do not themselves include physically or mechanically loading or unloading maritime cargo. This test specifically encompasses workers who, like respondents, engage in cleaning, mainte-

from its land transport by wagon into a pier warehouse. His loading activities were limited by union rules similar to those applied to Ford. *Id.* at 71-72.

¹⁴ The courts take an identical tack in determining whether employees are "harbor-workers" engaged in ship repair, shipbuilding, and shipbreaking. See, e.g., *Newport News Shipbuilding & Drydock Co. v. Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978).

nance, and repair of equipment used to load ships.¹⁵

b. In holding that respondents were not employees under the LHWCA, the Virginia Supreme Court expressly rejected the courts of appeals' functional test and adhered, instead, to its earlier decision in *White v. Norfolk & W. Ry.*, *supra*. Pet. App. 17A. *White* limited coverage under the Act to those employees having a " 'realistically significant relationship' to 'traditional maritime activity involving navigation and commerce on navigable waters.' " 217 Va. at 832, 232 S.E.2d at 812 (quoting

¹⁵ See, e.g., *Harmon v. Baltimore & O.R.R.*, 741 F.2d 1398, 1404 (D.C. Cir. 1984) (railroad worker injured while repairing coal loading equipment is covered employee because his "functions were an integral part of the process of unloading and loading vessels and were vital to the movement of maritime cargo"); *Prolerized New England Co. v. Miller*, 691 F.2d 45, 47 (1st Cir. 1982) (worker performing maintenance of ship loading equipment plays "integral part" in loading process); *Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs*, 685 F.2d 1121, 1123 (9th Cir. 1982) (LHWCA applies to mechanic responsible for repairing equipment used to load cargo onto ships and move it within terminal area because "repair and maintenance of equipment necessary to loading and unloading ships is integral to the process and is therefore 'maritime employment' "); *Hullinghorst Indus., Inc. v. Carroll*, 650 F.2d 750, 755-756 (5th Cir. 1981) (carpenter building scaffolding for repairs to loading pier engaged in "maritime employment," since "the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lies within the scope of 'maritime employment' " under the Act and such work is "an integral part * * * an essential and indispensable step in the [pier] repairs to be effected"), cert. denied, 454 U.S. 1163 (1982); *Garvey Grain Co. v. Director, Office of Workers' Compensation Programs*, 639 F.2d 366, 370 (7th Cir. 1981) (millwright responsible for maintenance and repair of shiploading equipment is employee under LHWCA, since these "functions are an integral part of the loading and unloading" process and "are directly connected with and are vital to the movement of maritime cargo"); *Prolerized New England Co. v. Benefits Review Bd.*, 637 F.2d 30, 37 (1st Cir. 1980) (coverage extends to employee whose duties include shortening scrap steel for shipment because "[v]iewed in terms of this functional analysis * * * [the claimant's] repair, maintenance and occasional operation of the varied elements of Prolerized's integrated loading system qualify as peculiarly maritime services"), cert. denied, 452 U.S. 938 (1981); *Price v. Norfolk & W. Ry.*, 618 F.2d 1059, 1061 (4th Cir. 1980) (railroad worker injured while painting "gallery" used for loading grain into ships falls within LHWCA's ambit because "[t]he gallery, and its maintenance, are essential to the loading and unloading of all vessels").

Weyerhaeuser Co. v. Gilmore, 528 F.2d at 961).¹⁶ The *White* decision makes clear that the court views the "realistically significant relationship" test as requiring direct involvement in the physical process of loading and unloading cargo. Thus, although White's duties required him to maintain electrical equipment essential to the coal loading process, the court concluded that he lacked the requisite "realistically significant relationship to the loading of cargo on ships," because he was "not actually handling any cargo, either manually or mechanically," and "was not manipulating * * * any of the controls of the electrical mechanism, which furnished the power for this automated loading process." 217 Va. at 832-833, 232 S.E.2d at 813. Applying *White*, the court concluded here that respondents Schwalb and McGlone were not statutory employees because they also were not actually "engaged in the handling of cargo" (Pet. App. 14A), notwithstanding that failure to clean trash coal from the rollers and belts would halt the loading process (*id.* at 4A) and that only the "vagaries of union jurisdiction"—specifically, union agreements covering various groups of workers at the terminal—prohibited Schwalb and McGlone from placing the coal back on the belts (*id.* at 4A). The court applied its narrow approach again when it ruled that respondent Goode was not an employee under the Act, although Goode's duties consisted largely of maintenance and repair of machinery and equipment used exclusively for coal loading in a terminal where loading apparently is almost entirely automated (see *id.* at 46A-48A).

We believe that the Supreme Court of Virginia erred in reading this Court's opinions to direct so restrictive a standard for landward coverage under the LHWCA. The Virginia court

¹⁶ The Virginia Supreme Court's continued reliance on *Weyerhaeuser Co. v. Gilmore* is misplaced. The Ninth Circuit has made it clear that it reads *Weyerhaeuser's* "realistically significant relationship" language to mean that "repair and maintenance of equipment necessary to loading and unloading ships is integral to the process and is therefore 'maritime employment' covered by the Act." *Sea-Land Services, Inc.*, 685 F.2d at 1123. Thus, the Ninth Circuit applies its *Weyerhaeuser* formulation in harmony with authority in the other federal circuits.

reads the "essential elements" and "overall process" language in *Northeast Marine Terminal* and *Pfeiffer* in far too cramped a manner (Pet. App. 13A-16A), giving no effect to the directive in those cases that the Act's coverage be viewed expansively, and making no accommodation for the impact of modern technology on cargo handling techniques, for the high degree of job specialization, or for the extent of unionization within the longshore industry.¹⁷ In addition, the conflict between the state court's decision and the weight of federal authority in and of itself offends Congress's goal of applying a "simple, uniform standard of coverage" to LHWCA claimants.¹⁸

3. A restrictive interpretation of landward coverage under the LHWCA conflicts with the Department of Labor's inter-

¹⁷ Thus, for example, but for the union contracts that prohibited them from placing the trash coal that they had cleared away back on the conveyor belts, Schwab and McGlone indubitably would have done so. They would then have been involved directly in the actual loading process.

¹⁸ Goode also makes an unpersuasive argument that the state court's exclusion of him from LHWCA coverage is not at odds with the overwhelming weight of federal case law because, until the "unloading process had been completed, the coal was still in land transportation and was not in the process of being loaded aboard a ship" (88-127 Br. in Opp. 20-21). The circuit court specifically found that "the process of loading the coal into vessels begins" once the rail cars leave the barney yard (Pet. App. 46A), and Goode has not even suggested that this finding should be set aside. Additionally, although the decision of the Fourth Circuit in *Conti v. Norfolk & W. Ry.*, 566 F.2d 890 (1977) (brakemen injured at Lambert's Point were not employees under the LHWCA) supports Goode's argument, we agree with the observation of the Court of Appeals for the District of Columbia Circuit that the Fourth Circuit has "moved away from using the distinction between 'traditional railroading tasks' and 'traditional maritime tasks' as the sole inquiry, or the dispositive issue in LHWCA cases." *Harmon v. Baltimore & O.R.R.*, 741 F.2d 1398, 1404 (1984) (citing *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1050 (4th Cir. 1980) (*Conti* cited only for "integral part" language); *Price, supra* (drawing no *Conti*-like distinction between "traditional railroading" as opposed to "traditional maritime" tasks), and *Vogelsang v. Western Maryland Ry.*, 670 F.2d 1347, 1348 (4th Cir. 1982) (distinguishing *Conti*)). This and other courts have, of course, found railroad workers covered by the LHWCA despite the parallel coverage of the FELA, see, e.g., *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334 (1953); *Harmon, supra*; *Vogelsang, supra*; *Price, supra*, and in such circumstances LHWCA coverage is exclusive under 33 U.S.C. 905.

pretation of the Section 2(3) status requirement, which it has consistently applied since 1972 in administering the LHWCA workers' compensation program. See *Northeast Marine Terminal*, 432 U.S. at 272 (Director's view that " 'maritime employment * * * include[s] all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation' "). Review is warranted because, at the very least, the Department's interpretation is "based on a permissible construction of the statute"; hence it is entitled to deference and should be given effect. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); see, e.g., *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 635 (1983) (consistent practice of those charged with enforcement and interpretation of LHWCA entitled to deference); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (great deference due interpretation of officers or agency administering statute); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) (construction of statute by those charged with executing it should be followed "unless there are compelling indications that it is wrong").

Further, a restrictive interpretation is also inconsistent with the view of the Benefits Review Board. See, e.g., *Wuellet v. Scappoose Sand & Gravel Co.*, 18 Ben. Rev. Bd. Serv. (MB) 108, 110-111 (1986) (welder/mechanic injured while repairing conveyor belt at barge-loading facility is covered under LHWCA since "the repair of equipment at employer's barge facility is an integral part of the loading process * * * and therefore is a maritime activity"); *Verderane v. Jacksonville Shipyards, Inc.*, 20 Ben. Rev. Bd. Serv. (MB) 62, 64 (1984) (manager of shipyard's Medical, Safety and Security Department, whose duties required inspecting certain shipbuilding equipment and assuring compliance with safety regulations, was covered employee since he "performed an integral role in assuring" shipyard workers' safety and his duties "were important to the overall progress of maritime construction").

4. The Virginia Supreme Court's interpretation of the LHWCA's status requirement creates a wide rift between the state court, on the one hand, and the federal courts, the Department of Labor, and the BRB, on the other. While normally a single aberrational decision would not warrant this Court's review, we agree with petitioners that the potential impact of the conflict here is substantial, especially in view of the vagaries of Virginia's venue statute (see 87-1979 Pet. 38-39; 88-127 Pet. 42-43). The decision invites forum-shopping among injured workers, including many who reside out-of-state. Workers with potentially strong FELA claims will opt for state court actions, while those confronted with the choice between inadequate or uncertain state remedies and LHWCA benefits will sue in federal court. This result plainly frustrates Congress's intent that a single uniform standard of coverage apply to LHWCA claims. Accordingly, review by this Court is warranted to resolve this conflict.

CONCLUSION

The petitions for writs of certiorari should be granted and the cases consolidated for oral argument.

Respectfully submitted.

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JANUARY 1989

Supreme Court, U.S.
FILED
APR 21 1988
JOSEPH F. SPANIOLO,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE,
Respondents.

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

ROBERT T. GOODE, JR.,
Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT
OF VIRGINIA

CONSOLIDATED JOINT APPENDIX

WILLIAM T. PRINCE*
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**CONSOLIDATED
JOINT APPENDIX
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| 11/04/83 | Motion for Judgment (by pltf) . . . action arises under FELA |
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| 01/13/84 | Special Plea to Jurisdiction (by deft) . . . sole remedy under LHWCA |
| 06/06/84 | Evidentiary HEARING on jurisd. question before Judge Douglas M. Smith |
| 08/08/84 | Opinion Letter (DMS) . . . sustaining plea, pltf's remedy under LHWCA |
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| 09/12/84 | Notice of Appeal (by pltf) |
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| | ORDER (Virginia Supreme Court) . . . judgment reversed and annulled, case remanded for trial under FELA . . . eod 3/4/88 |
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| 05/29/85 | Opinion Letter (LS) . . . sustaining plea, pltf's sole remedy under LHWCA |
| | ORDER (trial court) . . . action dismissed with prejudice . . . eod 6/13/85 |
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| | ORDER (Virginia Supreme Court) . . . judgment reversed and annulled, case remanded for trial on merits under FELA . . . eod 3/4/88 |
| | ORDER (Virginia Supreme Court) . . . execution of judgment suspended pending resolution of pet. for writ of certiorari . . . eod 6/8/88 |

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ROBERT T. GOODE, JR.**

| DATE | PROCEEDINGS |
|-------------|---|
| 2/13/86 | Motion for Judgment (by pltf) . . . action arises under FELA |
| 3/13/86 | Motion to Dismiss and Grounds of Defense (by deft) . . . exclusive jurisdiction under LHWCA |
| 9/19/86 | Evidentiary HEARING on jurisd. question before Judge Charles R. Waters, II |
| 11/13/86 | Opinion Letter (CRW) . . . dismissing motion for judg., exclusive jurisd. under LHWCA |
| | ORDER (trial court) . . . action dismissed with prejudice . . . eod 12/17/86 |
| 1/7/87 | Notice of Appeal (by pltf) |
| | ORDER (Virginia Supreme Court) . . . judgment reversed and case remanded for trial on merits under FELA . . . eod 4/22/88 |
| | ORDER, Virginia Supreme Court, issuance of mandate deferred |

**VIRGINIA: IN THE CIRCUIT COURT FOR
THE CITY OF NEWPORT NEWS**

LAW NO. 8827-S

NANCY J. SCHWALB,

Plaintiff,

vs.

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A CORPORATION,**

Defendant.

MOTION FOR JUDGMENT

Plaintiff moves the Court for judgment and award of execution against the Defendant, in the sum of \$1,000,000.00, on the following grounds:

1. This action arises under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq., as hereinafter more fully appears.

2. During all times mentioned herein, Defendant owned and operated, in interstate commerce, a railroad, and the operations and work of the Plaintiff, as hereinafter alleged, were a part and parcel of the operation of the Defendant's line in interstate commerce at the time of injuries to the Plaintiff.

3. Plaintiff is a resident of Newport News, Virginia, and at all times herein mentioned, was employed by the Defendant as a laborer, and worked at said job in the City of Newport News, on the Defendant's premises, which premises were owned, operated and controlled by Defendant.

4. Jurisdiction and venue lie with this Court by virtue of the foregoing.

5. That on January 12, 1983 at about 12:15 a.m. of said day, the Plaintiff was engaged in the customary performance of her duties, and was required by Defendant to be working in its yards in Newport News, Virginia, under the supervision of other employees of the Defendant. Plaintiff was required to clean the trunion rollers which required her to walk on the catwalk, which was not lighted. As Plaintiff was walking on the catwalk to the rollers, she missed a step which she could not see causing her to fall forward, striking her head on the metal catwalk, and became unconscious, and injuring her thumb on the railing. Plaintiff was required to work in a dark and dangerous place which was not lighted. Defendant failed to provide a flashlight or other adequate lighting. Defendant failed to provide adequate help and assistance and failed to provide any safety devices. Plaintiff was then and there and at all times herein mentioned, acting in the exercise of reasonable care for her own safety.

6. At all pertinent times it became and was the duty of Defendant to:

- (a) Furnish Plaintiff a reasonably safe place to work.
- (b) Exercise reasonable care and caution for the safety of Plaintiff while she was performing said work.

7. While Plaintiff was engaged in the performance of the aforesaid work required by Defendant, she was caused to sustain injuries as hereinafter set forth by reason of the violation of the Defendant of its aforesaid duties.

8. At said time and place, the Defendant and its employees as aforesaid, in violation of the Federal Employers' Liability Act of the United States, carelessly and negligently did one or more of the following acts or omissions which were the cause of said occurrence, and the injuries sustained by the Plaintiff.

- (a) Failed to furnish Plaintiff a reasonably safe place within which to do her said work;

- (b) Failed to provide plaintiff with safe and proper tools and equipment to do said work;
- (c) Failed to provide a flashlight and/or adequate lighting to safely do said work;
- (d) Failed to provide adequate help and assistance;
- (e) Failed to inspect, repair and maintain its premises;
- (f) Failed to adopt, enforce, and carry out safe customs and practices in doing said work;
- (g) Negligently assigned Plaintiff to walk on a dangerous catwalk without providing adequate safety precautions and equipment; without providing a flashlight; without providing adequate lighting; without providing adequate help and assistance; negligently assigning plaintiff to walk on a catwalk which was not lighted, all of which Defendant knew or should have known in the exercise of due care was dangerous and unsafe for Plaintiff.
- (h) Other acts of negligence which may be shown at trial.

9. As a direct and proximate result of the aforementioned negligence and carelessness of the Defendant and its employees and its Violation of the Federal Employers' Liability Act as aforesaid, Plaintiff has suffered severe injuries to her head and thumb, has suffered severe brain damage, and was otherwise injured; has suffered pain in the past and will suffer pain in the future; has incurred expenses for medical attention and hospitalization and will incur further like expenses in the future, has suffered loss of earnings in the past and will suffer same in the future; has suffered permanent injury and disability, all to her injury and damage.

10. That by reason of the foregoing, Plaintiff has sustained damages at the hands of the Defendant in the sum of \$1,000,000.00.

WHEREFORE, Plaintiff demands judgment against the above named defendant, The Chesapeake and Ohio Railway Company, a Corporation, in the sum of \$1,000,000.00, together with the costs of the action incurred herein.

NANCY J. SCHWALB

By /s/ Peter W. Rowe
Of Counsel

By /s/ Donald L. Rudquist
Of Counsel

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**VIRGINIA: IN THE CIRCUIT COURT FOR
THE CITY OF NEWPORT NEWS**

LAW NO. 8827-S

NANCY J. SCHWALB,

Plaintiff,

vs.

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A CORPORATION,**

Defendant.

SPECIAL PLEA TO JURISDICTION

Now comes the defendant whose proper name is The Chesapeake and Ohio Railway Company and appearing specifically in response to the plaintiff's Motion for Judgment says that this court lacks jurisdiction herein on the ground that the plaintiff's sole and exclusive remedy upon the matters alleged in the Motion for Judgment is under the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 905(a).

**THE CHESAPEAKE AND OHIO
RAILWAY COMPANY**

By /s/ Richard Wright West
Of Counsel

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Counsel for Defendant

**VIRGINIA: IN THE CIRCUIT COURT OF
THE CITY OF PORTSMOUTH**

AT LAW NO. _____

WILLIAM C. MCGLONE,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

SERVE:

Aubrey R. Bowles, III, Esquire
Registered Agent,
Chesapeake & Ohio Railway Company
901 Mutual Building
Richmond, Virginia 23219

MOTION FOR JUDGMENT

The plaintiff hereby moves this Honorable Court for a Judgment and an award of execution against the defendant, the Chesapeake and Ohio Railway Company, in the sum of Two Million Five Hundred Thousand Dollars (\$2,500,000.00) by reason of the following facts, to-wit:

1. That the defendant is a Railroad Corporation organized and existing under and by virtue of the laws of the State of VIRGINIA, and was, at all times mentioned herein doing business within the jurisdiction of this Court as a common carrier of intrastate and interstate commerce.

2. The plaintiff's action arises under the following Act of Congress of April 22, 1908, 35 Stat. 65, Chap. 149, with amendments thereto, more commonly known as "The

Federal Employers' Liability Act" (45 USCA Chap. 2, Sec. 51-60), as amended on August 11, 1939.

3. That at all times herein mentioned defendant was an intrastate and interstate carrier and was engaged in interstate transportation and commerce. At the time of his injury, plaintiff was working in furtherance of interstate commerce and participating in work which directly, closely and substantially affected the general interstate commerce carried on by the defendant.

4. That on or about February 1, 1983 the plaintiff was an employee of the defendant, Chesapeake and Ohio Railway Company, as a laborer, and on or about said date, while so employed in the regular course of his duties on land at Newport News, Virginia, was injured while performing such duties, to-wit: While trying to blow coal out from beneath Number Three (3) Belt a roller caught the air hose and jerked the hose and plaintiff's right arm into the roller causing him serious injury.

5. The defendant herein regularly and systematically conducts affairs or business activity within the City of Portsmouth, Virginia.

6. That the defendant negligently and carelessly failed to provide plaintiff with a safe place to work, and required plaintiff to work on premises that were maintained in a negligent manner; that defendant negligently and carelessly failed to provide plaintiff with adequate, effective, and efficient assistance, equipment and instructions or time to carry out his duties, and failed to maintain and provide plaintiff efficient and safe equipment; that defendant's agents, servants and employees acted in a negligent and careless manner; that defendant failed to properly inspect its equipment and premises and that as a result of the aforesaid carelessness and negligence of the defendant the plaintiff was caused to suffer severe and permanent injuries.

7. That the defendant Railway Company failed to comply with the Federal Employers' Liability Act (45 USCA Chap. 2, Secs. 51-60) as amended on August 11, 1939, as hereinbefore more fully appears.

8. That as a result of the accident of February 1, 1983 the plaintiff was caused to lose, and he will in the future be caused to lose, income which he otherwise would have earned.

9. That as a result of the accident of February 1, 1983, the plaintiff was caused to suffer, and will in the future be caused to suffer, great physical pain and mental anguish.

10. That as a result of the accident of February 1, 1983, the plaintiff was caused to expend, and he will in the future be caused to expend, large sums of money for medical expenses.

11. That as a result of the accident of February 1, 1983, the plaintiff was caused to be unable, and he will in the future be unable, to perform his necessary and lawful affairs.

WHEREFORE, plaintiff demands a trial by jury and prays for judgment against the defendant, The Chesapeake and Ohio Railway Company, in the sum of Two Million Five Hundred Thousand Dollars (\$2,500,000.00) with interest and his costs.

WILLIAM C. MCGLONE

By /s/ Russell N. Brahm, III
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**VIRGINIA: IN THE CIRCUIT COURT OF
THE CITY OF PORTSMOUTH**

LAW NO. L-83-327

WILLIAM C. MCGLONE,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

SPECIAL PLEA TO JURISDICTION

Now comes the defendant appearing specially in response to the plaintiff's Motion For Judgment and says that this court lacks jurisdiction herein on the ground that the plaintiff's sole and exclusive remedy upon the matters alleged in the Motion for Judgment is under the Long-shoremen's and Harbor Workers' Compensation Act, 33 USC 905(a).

**THE CHESAPEAKE AND OHIO
RAILWAY COMPANY**

By /s/ Richard Wright West
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Counsel for Defendant

**VIRGINIA: IN THE CIRCUIT COURT OF
THE CITY OF NORFOLK**

AT LAW NO. L86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY CO.,

Defendant.

Serve: Richard A. Keeney
Registered Agent
8 North Jefferson Street
Roanoke, Virginia 24042

MOTION FOR JUDGMENT

The Plaintiff hereby moves this court for a judgment and an award of execution against the Defendant, Norfolk and Western Railway Company, in the sum of One Million Two Hundred Fifty Thousand Dollars, (\$1,250,000.00) by reason of the following facts, to-wit:

1. That the Defendant is a railroad corporation organized and existing under and by virtue of the laws of the State of Virginia, and was, at all times mentioned herein doing business within the jurisdiction of this Court as a common carrier of intrastate and interstate commerce.

2. That Plaintiff's action arises under the Acts of Congress of April 22, 1908, 35 Stat. 65, Chapter 149, with amendments thereto, commonly known as The Federal Employers' Liability Act (45 USCA Chap. 2, Sec. 51-60),

as amended August 11, 1939, as hereinafter more fully appears.

3. That at all times herein mentioned Defendant was an intrastate and interstate carrier, and was engaged in interstate transportation and commerce. At the time of his injury, Plaintiff was working in furtherance of interstate commerce and participating in work which directly, closely and substantially affected the general interstate commerce carried on by the Defendant.

4. That on or about February 11, 1985, Plaintiff was an employee of the Defendant and on or about said date, while so employed, in the regular course of his duties at or near the Barney Yard, Lamberts Point Yard, Norfolk, Virginia, Plaintiff was injured while performing such duties.

5. That the Defendant negligently and carelessly failed to provide Plaintiff with a safe place to work; required Plaintiff to report and work on premises that were maintained in a negligent manner; that Defendant negligently and carelessly failed to maintain and provide the Plaintiff sufficient and safe equipment; that Defendant negligently and carelessly failed to inspect, repair and maintain the area of the accident and failed to warn Plaintiff of a dangerous condition that existed in the work area; that the Defendant failed to provide sufficient and adequate assistance for Plaintiff to safely perform his work duties; that the Defendant negligently and carelessly allowed a dangerous condition to exist; that Defendant failed to use modern, safe and efficient equipment in the machinery on which Plaintiff was required to work; and that as a result of the aforesaid carelessness and negligence of the Defendant, the Plaintiff was caused to suffer severe and permanent injuries.

6. That the Defendant failed to comply with The Federal Employers' Liability Act (45 USCA Chap. 2, Secs. 51-60)

as amended on August 11, 1939, as hereinbefore more fully appears.

7. That as a result of the accident complained of herein, the Plaintiff was caused to lose, and will in the future be caused to lose, income which he otherwise would have earned.

8. That as a result of the accident complained of herein, the Plaintiff was caused to suffer, and will in the future be caused to suffer, great physical pain and mental anguish.

9. That as a result of the accident complained of herein, the Plaintiff was caused to expend, and he will in the future be caused to expend, large sums of money for medical expenses.

10. That as a result of the accident complained of herein, the Plaintiff was caused to be unable, and will in the future be unable, to perform his necessary and lawful affairs.

WHEREFORE, Plaintiff DEMANDS A TRIAL BY JURY and prays for judgment against the Defendant in the sum of One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00).

ROBERT T. GOODE,
JR.

By /s/ Eddie W. Wilson
Of Counsel

By /s/ Richard J. Tavss
Of Counsel

By /s/ Bruce A. Wilcox
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**VIRGINIA: IN THE CIRCUIT COURT OF
THE CITY OF NORFOLK**

DOCKET NO. L-86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY CO.,

Defendant.

MOTION TO DISMISS

Defendant, Norfolk and Western Railway Co., moves the Court to dismiss this action on the grounds that the Court is without jurisdiction of the subject matter, Congress having vested exclusive jurisdiction in the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C.A. § 901, *et seq.*

NORFOLK & WESTERN RAILWAY CO.

By /s/ John Y. Richardson, Jr.
Of Counsel

1 GROUNDS OF DEFENSE

Defendant, Norfolk and Western Railway Co., for its grounds of defense to the motion for judgment filed herein, comes and says:

1. That the allegations of paragraph 1 of the motion for judgment are admitted.

2. That the allegations of paragraph 2 of the motion for judgment are denied.

3. That the allegations of paragraph 3 of the motion for judgment are admitted.

4. That at the time of the accident complained of, plaintiff was engaged in maritime employment; defendant expressly requests a reply to this allegation of new matter.

5. That the accident and injury complained of occurred on the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel); defendant expressly requests a reply to the new matter alleged herein.

6. That with regard to the allegations contained in paragraph 4 of the motion for judgment, defendant admits plaintiff was injured on or about February 11, 1985 and was an employee of the defendant on that date, however, all other allegations are denied.

7. That the allegations of paragraphs 5, 6, 7, 8, 9 and 10 of the motion for judgment are denied.

8. That plaintiff was guilty of negligence which proximately caused or contributed to cause the action and the injuries complained of, and plaintiff failed to use due care to mitigate his damages. The plaintiff was not injured to the extent alleged and is not entitled to recover \$1,250,000.00 or any other sum in this action.

9. That plaintiff has waived his rights to proceed against the defendant by his acceptance of benefits under the Longshoremen's and Harbor Worker's Compensation Act and has made a binding election of remedies.

10. That defendant reserves the right to amend its grounds of defense during discovery of this matter or at trial.

NORFOLK & WESTERN RAILWAY CO.

By /s/ John Y. Richardson, Jr.
Of Counsel

Edward L. Oast, Jr.
John Y. Richardson, Jr.
Williams, Worrell, Kelly & Greer, P.C.
600 United Virginia Bank Building
Norfolk, VA 23510

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to Eddie W. Wilson and Richard J. Tavss, this 13th day of March, 1986.

/s/ John Y. Richardson, Jr.

JA-20

PRESENT: All the Justices
OPINION BY JUSTICE RICHARD H. POFF
March 4, 1988

Record No. 841743

NANCY J. SCHWALB

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

FROM THE CIRCUIT COURT OF THE
CITY OF NEWPORT NEWS
Douglas M. Smith, Judge

Record No. 850728

WILLIAM MCGLONE

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

FROM THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH
Lester E. Schlitz, Judge

In this appeal, we review two judgments entered in separate actions, each sustaining a plea to the jurisdiction. Claiming damages for personal injuries, each plaintiff had invoked the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982) (FELA). In each appeal, the sole issue is

whether the plaintiff was a statutory employee as defined in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982) (LHWCA or the Act). If so, the parties agree that the remedy provided by the Act is exclusive, *see* 33 U.S.C. § 905(a) (1982), and that we should affirm the judgments.

The two plaintiffs are Nancy J. Schwalb and William C. McGlone. Each was an employee of the defendant, The Chesapeake and Ohio Railway Company. Although the accidents resulting in the plaintiffs' injuries occurred at different times, the facts in the two cases, insofar as relevant to the issue common to the two appeals, are substantially identical. Each plaintiff was employed as a laborer to perform housekeeping and janitorial services in the offices, shops, bathrooms, and other places situated on the defendant's pier and adjacent property in Newport News. This property is equipped with facilities designed to transfer coal from railroad cars to ships moored at the pier. A "dumper", activated by "trunnion rollers", upends railroad cars and dumps the coal into "hoppers". The coal falls from the hoppers onto conveyor belts that carry it to a "loading tower" from which it is poured into the hold of a ship.

Coal spilled on the trunnion rollers can cause the dumpers to malfunction. Coal falling and accumulating beneath the conveyor belts eventually may damage the belts and interrupt the loading process. As part of the duties assigned by the defendant, the plaintiffs were required to clear away coal spilled in these areas. Because they were not members of a longshoremen's union, the plaintiffs were forbidden to load that coal onto the conveyor belts. The plaintiff McGlone was clearing away coal beneath a conveyor belt at the time he was injured. The plaintiff Schwalb was injured in a fall as she was walking along a "catwalk" approaching the trunnion rollers.

The parties in both cases agree that the defendant railroad is a statutory employer as defined in the LHWCA, that is, an employer "any of whose employees are employed in maritime employment, in whole or in part". 33 U.S.C. § 902(4) (1982). The plaintiffs' contention is that the trial courts erred in ruling that they were statutory employees as defined in the Act. The plaintiffs rely upon our decision in *White v. N. and W. Ry. Co.*, 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977). Reviewing a judgment based on such a ruling, we applied the Act as amended in 1972, Pub. L. No. 92-576, 86 Stat. 1251, to the facts in *White*. First enacted in 1927, Pub. L. No. 69-803, 44 Stat. (part 2) 1424, the LHWCA was the first successful congressional response to the Supreme Court's decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). There, the Court had ruled that a state worker's compensation act could not constitutionally apply to a longshoreman injured in an accident that had occurred on a gangplank between a pier and a ship. Initially, Congress sought to authorize states to extend their workers' compensation statutes seaward of the *Jensen* line, but the Court held the state statutes to be unconstitutional delegations of congressional power. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

Although the federal Act filled a workers' compensation void, the LHWCA, as originally enacted, provided coverage only when "disability or death result[ed] from an injury occurring upon the navigable waters of the United States". 33 U.S.C. § 903(a) (1927). Federal compensation coverage stopped at the *Jensen* line; the Act did not apply to a longshoreman injured at work on a pier, even though engaged in traditional longshoremen's functions. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 218-20 (1969).

The 1972 amendments to the LHWCA moved the *Jensen* line landward to include areas adjoining navigable waters and "customarily used by an employer in loading, unload-

ing, repairing, or building a vessel". 33 U.S.C. § 903(a) (1982). Yet, Congress did not extend federal coverage to every worker injured in such areas, for it added an amendment defining a covered employee as "any person engaged in maritime employment." 33 U.S.C. § 902(3) (1982). The effect of the two amendments was to create a two-pronged coverage test—the situs of the injury and the status of the injured worker.

In *White*, a railroad employee filed a claim under FELA. He had been injured on a situs covered by the LHWCA, and "the critical question presented . . . [was] whether plaintiff was a 'person engaged in maritime employment' and thus an 'employee' within the meaning of the Act." 217 Va. at 827, 232 S.E.2d at 809. White was hired as an electrician to maintain and repair the electrical equipment used at a pier to dump coal from railroad cars, to move conveyor belts transporting the coal, and to load the coal into ships. Although White did not operate any of the equipment employed in the loading process, the railroad argued that "all of his activity was 'functionally related' to the loading of coal on ships", *id.* at 831, 232 S.E.2d at 812, and that he was, therefore, an employee engaged in maritime employment and, as such, was limited to the remedy provided by the LHWCA.

In *White*, the railroad had borrowed the "functional relationship" formula from the opinion in *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation*, 540 F.2d 629, 637-38 (3d Cir. 1976). Considering the history of the Act and construing the congressional intent underlying the 1972 amendments, we rejected that formula. We adopted, instead, the standard articulated in *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir.), *cert. denied*, 429 U.S. 868 (1976)¹:

¹ The Supreme Court disapproved application of a significant relationship standard to determine the status of the worker in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 302 n.8, 318-

[F]or an injured employee to be eligible for federal compensation under [the Act], his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters,' with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in § 903.

Applying the *Gilmore* standard, we said that "we do not believe plaintiff's duties . . . had a realistically significant relationship to the loading of cargo on ships", that "plaintiff was not a covered 'employee' within the meaning of the Act", and that "the order dismissing plaintiff's FELA action will be reversed". 217 Va. at 832-33, 232 S.E.2d at 813.

In the appeals at bar, the defendant railroad relies on *Price v. Norfolk & W. Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980). There, the plaintiff in an FELA action was a painter employed by the defendant railroad. He sustained an injury while painting the support towers of a structure housing a conveyor belt system used in loading grain into the hold of a vessel. The *Price* court reasoned that, because "the failure to paint would eventually lead to severe rusting that would halt the entire [loading] process", *id.* at 1062 n.4, the plaintiff was engaged in maritime employment and, consequently, "was an 'employee' within the meaning

19 (1983). The Court did not, however, disapprove a significant relationship standard as a concept when applied, as in *Gilmore*, to post-1972 coverage landward of the *Jensen* line. As noted by the majority in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424 n.10 (1985) (quoting *Perini*, 459 U.S. at 299, 324 n.34) the decision in *Perini* "was carefully limited to coverage of an employee 'injured while performing his job upon actual navigable waters' . . . [and] was, 'of course,' limited to workers covered prior to 1972".

of the LHWCA which provides an exclusive remedy", *id.* at 1062.

We cannot agree that Congress intended the 1972 amendments to have such pervasive and preclusive effects. Nor do we agree with the argument advanced by the railroad in these appeals that the Supreme Court implicitly has overruled our decision in *White*. On brief, the defendant says that "the U.S. Supreme Court has stated that one is engaged in maritime employment if he is 'engaged in the *overall* process of loading and unloading vessels' (emphasis supplied)." For this proposition, the defendant cites *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). The language the defendant quotes from that decision is an abbreviated excerpt lifted from a longer passage, the import of which we construe differently.

The injuries at issue in *Caputo* were sustained during the process of unloading a ship. Considering the reports of the congressional committees that initiated the 1972 amendments, the Court concluded that Congress intended

to cover those workers involved in the *essential elements* of unloading a vessel—taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered. Also excluded are employees who perform purely clerical tasks and are not engaged in the handling of cargo.

Id. at 267 (emphasis added). As we construe this language, the Court reasoned that, although clerical employees working on a covered situs may have responsibilities related to

the commercial process, unless they are "engaged in the handling of cargo", they are not "involved in the essential elements of [loading or] unloading a vessel" and, therefore, are not statutory employees for purposes of the LHWCA. *Id.*

We recognize that the Act is remedial in purpose and, as the defendant says, that "*Caputo* requires an expansive view of LHWCA". We note, however, that the Court speaks of covered workers as those "involved in the essential elements of unloading a vessel", *id.*; as those "directly involved in the loading or unloading functions", *id.* at 271 (quoting S. Rep. 1125, 92d Cong., 2d Sess. 13 (1972) and H.R. Rep. 1441, 92d Cong., 2d Sess. 11 (1972)); and as those who "spend at least some of their time in indisputably longshoring operations", *id.* at 273. Two years following *Caputo*, the Court said that "workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act." *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82 (1979). And the Supreme Court, recalling the language of *Caputo*, emphasized in its most recent analysis of the status test that the purpose of the maritime employment requirement was "to cover those workers on the situs who are involved in the *essential elements* of loading and unloading". *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985) (emphasis added).

We believe the "essential elements" standard is more nearly akin to the "significant relationship" standard we adopted in *White* than the "overall process" construction invoked by the defendant. In this respect, we see no logical difference between workers "who perform purely clerical tasks", *Caputo*, 432 U.S. at 267, and workers who perform purely maintenance tasks, such as painting, or workers who, like the plaintiffs in these appeals, perform purely housekeeping and janitorial tasks.

Applying the rule in *White*, we hold that the plaintiffs were not statutory employees as defined in the LHWCA.

We will reverse the judgments dismissing the plaintiffs' FELA actions and remand the cases for trials on the merits.³

Record No. 841743 - Reversed and remanded.

Record No. 850728 - Reversed and remanded.

³ In the Schwalb appeal, the defendant argues that the plaintiff "is estopped from denying LHWCA coverage" because she accepted compensation paid under the Act. According to the defendant's brief, "[s]he expresses no agreement to off-set compensation payments previously received against any recovery under FELA and, therefore, double recovery remains a possibility." But, in a memorandum of law filed in the trial court, we find that the plaintiff acknowledged that "any recovery by plaintiff on her FELA claim will be reduced by the amount of LHWCA benefits she may have already received." A railroad worker who makes such a concession does not seek a double recovery and is not precluded from pursuing a remedy under FELA. *Freeman v. Norfolk and Western Ry. Co.*, 596 F.2d 1205, 1208 (4th Cir. 1979); accord *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1049 (4th Cir. 1980).

SEVENTH JUDICIAL CIRCUIT OF VIRGINIA
Newport News, Virginia 23607

August 8, 1984

Ms. Frances S.P. Li
Suite 565
608 2nd Avenue South
Minneapolis, Minnesota 55402

Mr. William W. Nexsen
Stackhouse, Rowe & Smith
P. O. Box 3570
Norfolk, Virginia 23514

Mr. Richard Wright West
West, Stein, West & Smith
P. O. Box 257
Newport News, Virginia 23607

Re: Nancy J. Schwalb v. The Chesapeake and Ohio Rail-
way Company At Law No. 8827

Dear Counsel:

You will recall that on June 6, 1984, the Court heard argument on a special plea to jurisdiction in the above captioned cause. This special plea was filed by the defendant C&O, in which they contend that the plaintiff's sole remedy in this cause is under LHWCA and consequently this court lacks jurisdiction on the motion for judgment.

The Court heard evidence of witnesses, stipulations by counsel, has read the memorandums of law and cases cited therein and am rendering my decision by this letter.

The plaintiff and defendant both agree that to be covered under LHWCA an injured employee must meet both a situs and a status test, both sides agree that the situs

test has been met. This leaves as the only question involved whether or not the plaintiff employee is engaged in maritime employment and the Court holds that the plaintiff Schwalb is so engaged, as her duties were essential to the loading and unloading of coal by conveyor belt to the ships moored at the docks. It is uncontradicted that if the spilled coal was not removed that it could have halted the process of loading the coal aboard the vessels. With the liberal interpretations expressed in decisions by the United States Supreme Court this Court has no difficulty in determining that the plaintiff's remedy is under the LHWCA. Therefore, the plea to the jurisdiction is sustained and I am requesting Mr. West to draw the appropriate order, noting plaintiff's exception and objection and having the order endorsed by opposing counsel and returning to the Court for entry.

Very truly yours,

/s/ Douglas M. Smith
Judge

THIRD JUDICIAL CIRCUIT
Circuit Court of the City of Portsmouth

May 29, 1985

Richard Wright West, Esquire

P.O. Box 257

Newport News, Virginia 23607

Russell N. Brahm, III, Esquire

P.O. Box 1138

Portsmouth, Virginia 23705-1138

Re: William McGlone v. Chesapeake and Ohio Railway
Co. L84-327

Gentlemen:

Thank you for your excellent and most exhaustive memoranda. I have reviewed the pleadings, the evidence and the argument of counsel, and I have read the memoranda and all *cf* the cases cited.

William McGlone, plaintiff, was injured at Newport News, Virginia, on February 1, 1983, and filed his Motion for Judgment against the Chesapeake and Ohio Railway Company, defendant, on May 31, 1983, under the Federal Employer's Liability Act (FELA), 45 U.S.C. 51, *et. seq.* Defendant filed a special plea to the jurisdiction on June 24, 1983, on the ground that plaintiff's sole and exclusive remedy upon the matters alleged in the Motion for Judgment is under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(a).

A hearing on the special plea was heard by this Court on March 29, 1985, evidence taken and a transcript prepared. It appears from the evidence that plaintiff and employee of the Chesapeake and Ohio Railway Company on the date of the accident was working on the pier as a laborer cleaning up coal which had fallen from a conveyor

belt which was being used to load coal onto a ship at the pier. The hopper and conveyor belt is an extension of the pier. If coal is not removed in the area where the plaintiff was cleaning up, the coal would eventually interfere with the loading operation and bring it to a halt. This work was frequently done by the plaintiff. Plaintiff was injured by the conveyor belt while engaged in this work. The sole action involved here is whether the plaintiff at the time of his injury was working in a maritime capacity as defined by the LHWCA.

An injured employee must meet both a "situs" and a "status" test in order to be covered under LHWCA. There seems to be no question here that the injured [sic] occurred in a covered situs but we must determine whether plaintiff occupied a status covered under LHWCA. *Noqueira v. New York, N.H., and H.R. Company*. 281 U.S. 128, (1930).

The Court must resolve a conflict in the case law between a decision of the Supreme Court of Virginia, *White v. Norfolk & Western Railway Co.*, 217 Va. 823 (1977), cert. denied, 434 U.S. 860 (1977) and *Price v. Norfolk & Western Railway Company*, 618 F2d 105 (1080) [sic], decided by the Fourth Circuit Court of Appeals. In *White* the court stated at page 832:

"Plaintiff was not actually handling any cargo either manually or mechanically, as was the case in the decisions principally relied on by N & W. Moreover, plaintiff was not manipulating (except to test) any of the controls of the electrical mechanism, which furnished the power for this automated loading process. Rather, he was only maintaining the electrical device on the shore and attached to the pier, work which is not the traditional work of a ship's service employee. Plaintiff was at least one step removed from a realistically significant relationship and from a direct involvement with the loading of vessels.

The mere fact that some of the plaintiff's cumulative injury was sustained out over the Elizabeth River while he worked inside the electrical rooms of the Pier 6 ship loaders, does not convert his status from that of a railroad electrician to that of a maritime worker."

It can thus be seen that the Virginia Supreme Court held that to qualify as an employee under LHWCA the plaintiff must have been directly involved in the loading of coal. Under this ruling plaintiff could not have been held to be an employee under LHWCA.

Price decided three years after *White* holds to the contrary.

The Fourth Circuit held that a railway employee who was injured while painting towers used in the loading of ships was an employee under LHWCA. The court held that merely because the employee was not directly involved in the actual loading of ships, this fact did not remove him from coverage under LHWCA because the maintenance of the towers was essential to the movement of maritime cargo and thus the employee was included in the broad concept of maritime employment.

This view has been upheld in many Federal court decisions. See: *Newport News Shipbuilding and Drydock Company v. Graham*, 573 F2d 167 (4th Circuit), cert. denied, 439 U.S. 979, 99 S.Ct. 563 (1978); *Northeast Marine Terminal Company v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977).

It will thus be seen that the Fourth Circuit has adopted a broad concept of maritime employment that maintenance of maritime cargo loading equipment is essential to the loading of cargo and is, therefore, included in the meaning of a person engaged in maritime employment under LHWCA.

White stands alone in contrast to the federal decisions which were decided after the decision in *White*.

Should this court blindly follow *White* because it is a State court decision, under the principle of *stare decises*? To do so would be to interpret a Federal law contrary to all of the decisions of the Federal courts which have declined to follow *White* and have disagreed with its results. It is the Court's belief that this conflict between the Supreme Court of Virginia and the Fourth Circuit Court of Appeals must be resolved in favor of the latter decisions of the federal courts and this Court reluctantly and respectfully declines to follow *White* since it feels the decision in *Price* is now controlling.

The Court is of the opinion that the plaintiff in this case, under the facts presented, was engaged in activity which made him an employee under the meaning of LHWCA, and that he is precluded from maintaining a FELA action in this case.

Defendant's special plea to the jurisdiction of this Court is sustained, and the plaintiff's Motion for Judgment will be dismissed from the docket.

Counsel for the defendant will prepare and circulate a sketch order in accordance with this letter and for presentment to the Court for entry.

Sincerely yours,

/s/ Lester E. Schlitz
Chief Judge

**FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK**

November 13, 1986

Eddie W. Wilson, Esquire
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P. O. Box 11168
Norfolk, Virginia 23517

John Y. Richardson, Jr., Esquire
Williams, Worrell, Kelly & Greer
600 United Virginia Bank Building
P. O. Box 3416
Norfolk, Virginia 23514-3416

Re: Robert T. Goode, Jr. vs. Norfolk and Western Rail-
way Co. At Law No. L-86-335

Gentlemen:

Thank you for the help that you have given the court. I have studied all of the material supplied, including the opinions cited in your excellent briefs.

If this case were one of first impression, I would be tempted to rule that Congress, by enacting the Longshoremen's and Harbor Workers' Compensation Act (L.H.W.C.A.), did not intend to strip a railroader of any of his benefits under the Federal Employer's Liability Act (F.E.L.A.) under any circumstances so long as he was working for the railroad at the time of injury, a narrow, unintellectual approach which makes good sense.

The duty of this court, however, is not to make law but to interpret and follow the law as set forth by courts of higher dignity. In following that duty, I feel that I am directed by the existing law to rule that, under the particular facts of this case, the motion for judgment must

be dismissed for reason that exclusive jurisdiction lies within the ambit of the L.H.W.C.A.

Railroad cars filled with coal come cross country in both interstate and intrastate commerce and come to rest in what is called the barney yard located near pier 6 at the Lambert's Point terminal in Norfolk, Virginia. After the coal has come to rest in the barney yard, the process of loading the coal into vessels begins. The loaded cars are moved from the barney yard through a thawing shed, and are then pushed up a raised track by small locomotives called pushers onto the dumper located near the piers. As these loaded cars are pushed on to the dumper, their progress is slowed or stopped by equipment known as a retarder. The cars revolve, dumping the coal onto conveyor belts which deliver the dumped coal directly into the holds of waiting vessels docked at the piers. The empty cars are pushed to the apex of the raised track and then, through the force of gravity, are returned to a holding yard from where they will again be dispatched to coal fields located in various parts of the country.

The plaintiff was a machinist who was injured while repairing the retarder on the dumper located near pier 6. The dumper and retarder on which the plaintiff was working are located 500 to 550 feet from the water. Retarders are located throughout the railroad system; however, the sole purpose of this retarder was to stop the loaded cars on the dumper to facilitate the transportation of coal from shore to vessel by dumping the coal on conveyor belts which feed the coal into the belly of docked vessels at pier 6. The entire loading operation at pier 6 must cease when the retarder is inoperative or is being repaired, and the loading operation had in fact ceased at the time of the injury to the plaintiff.

Machinists may be assigned to what is known as the Motive Power Department which has the function of maintaining and operating the coal dumping facility of the rail-

road. Machinists may be assigned to different locations such as the 38th Street car shop or the roundhouse, which may be miles away from the water, or they may be assigned to Lambert's Point. The location is determined by seniority, and a machinist working at the pier at Lambert's Point may be forced to work at another location because of the electing of a more senior machinist to work at the pier. At the time of the accident, the plaintiff had been assigned for some time to work at Lambert's Point. While assigned to Lambert's Point, machinists spend the overwhelming portion of their working time maintaining and repairing machines and equipment essential to the coal dumping operation. Machinists do not, for example, regularly repair cars for that is the job of the train men. The great majority of the working time of a machinist while assigned to Lambert's Point is spent on the maintenance and repair of machinery which facilitates the dumping operation after the cars have left the Barney yard. The machinists are required to pay into the railroad retirement plan and are subject to the Railway Labor Act.

Under the facts of this case, the railroad is an employer within the meaning of the L.H.W.C.A., *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128, 132, 44 L.Ed. 754, 50 S.Ct. 303 (1930), and the plaintiff is an employee within the meaning of the L.H.W.C.A., *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 53 L.Ed. 2d 320, 97 S.Ct. 2348 (1977); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 62 L.Ed. 2d 225, 100 S.Ct. 328 (1979), and he cannot walk in and out of coverage because, I believe, that the overwhelming portion of his work is essential to the loading and unloading operation.

The Supreme Court in *Herb's Welding v. Gray*, ___ U.S. ___, 84 L.Ed. 2d 406 (1985), while holding that a welder working on a fixed offshore oil-drilling platform was not engaged in maritime employment within the meaning of L.H.W.C.A., has stated:

But Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are *involved* in the *essential elements* of loading and unloading. (Emphasis added).

We have never read 'maritime employment' to extend so far beyond those *actually involved in moving cargo between ship and land transportation*. (Emphasis added).

On the facts of this case, I hold that the plaintiff was involved in the essential elements of loading and unloading and that he was actually involved in moving cargo between ship and land transportation. After all, the entire loading operation ceased during the repair of the retarder on which the plaintiff was working when injured. The location of the retarder was on the dumper, and the sole purpose of this particular retarder was to stop coal-loaded cars so that the coal could be dumped onto the belts feeding the vessel. It must be remembered that plaintiff's supervisors testified that 99 percent of the work of a machinist assigned to Lambert's Point was the maintenance and repair of machines and equipment directly and solely related to the loading and unloading operation. Even the most biased witnesses could not seriously testify that less than 50 percent of the work was not so related, while the machinist was assigned to Lambert's Point.

The plaintiff places a great deal of emphasis on *White v. N & W. Ry. Co.*, 217 Va. 832 (1977), decided in the same year as *Conti v. N. & W. Ry. Co.*, 566 F.2d 890 (4th Cir.).

It is my belief that, under the facts of this case, the plaintiff did have "a realistically significant relationship to the loading of cargo on ships" and that he was directly involved in the process of loading coal on the vessels within the meaning of the *White* test. Furthermore, this case does involve a federal question, the federal authorities are

therefore the more persuasive, and to the extent that *White* differs from significant federal decisions, the *White* court, in my opinion must yield.

As counsel well know, there have been a number of significant decisions subsequent to *White*, one of the leading decisions being *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059 (4th Cir.1980). In my opinion, the *Price* court did set forth the proper test in determining whether there is exclusive coverage under the L.H.W.C.A., that test being whether the plaintiff's job was an essential element in the loading and unloading of the vessels. I hold that in this case the plaintiff's job was an essential element, although in light of the later ruling in *Herb's Welding*, supra, I would not hold that the painter's job in the *Price* case was an essential element.

I believe that *Newport News Shipbuilding & Dry Dock v. Graham*, 573 F.2d 167 (4th Cir.), cert. den., 439 U.S. 979, 58 L.Ed. 2d 649, 99 S.Ct. 563 (1978), fortifies my opinion in this case, and I do not think that this opinion is in substantial conflict with *Conti v. N. & W. Ry. Co.*, 566 F.2d 890 (4th Cir. 1977), although I do agree with the D.C. Circuit Court that even before *Herb's Welding*, supra, the Fourth Circuit had moved away from a test of balancing traditional railroad tasks against traditional maritime tasks. *Harmon v. Baltimore & Ohio RR.*, 741 F.2d 1398 (D.C. Cir 1984).

I am cognizant of my colleague's decision in *Evans v. N. & W. Ry. Co.* (Norfolk Circuit Court 1985), but likewise do not feel that we are in conflict. After a close reading of his decision, I believe that, under the facts of this case, Judge Clarkson would have reluctantly reached the same decision which I have reluctantly reached.

With regard to the situs test, I hold that the most important factor is the nature of the work rather than the distance from the water and that the test has been met. *Graham*, supra; *Prolerized New England Co. v. Miller*, 691

F.2d 45 (1st Cir. 1982); *Prolerized New England Co. v. Ben. Rev. Bd.*, 637 F.2d 30 (1st Cir. 1980), cert. den. 452 U.S. 938, 101 S.Ct. 3080, 69 L.Ed. 2d 952 (1981); *Sea-Land Serv. v. Director, etc.*, 685 F.2d 1121 (9th Cir. 1982); *Garvey Grain Co. v. Director, etc.*, 639 F.2d 366 (7th Cir. 1981).

I commend both counsel for their thorough preparation for the hearing and their excellent briefs.

Mr. Richardson may prepare the order for Mr. Wilson's endorsement. Please have the order forwarded to me prior to November 19, 1986, if possible.

Very truly yours,

Charles R. Waters, II
Judge

**VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF NEWPORT NEWS**

LAW NO. 8827-S

NANCY J. SCHWALB,

Plaintiff,

vs.

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A CORPORATION,**

Defendant.

O R D E R

On June 6, 1984 came the parties and their attorneys, and the Court heard evidence and the argument of counsel upon the defendant's Special Plea To Jurisdiction. And having further considered the memoranda of the parties and having maturely considered the same, the defendant's Special Plea to Jurisdiction is SUSTAINED for the reasons more fully set forth in the Court's letter opinion of August 8, 1984.

Accordingly, this action is DISMISSED with prejudice to the plaintiff.

DATE: 8-22-84

ENTER:

/s/ D.M. Smith
Judge

I ask for this:

/s/ Richard Wright West
Counsel for Defendant

Seen and exception noted:

/s/ William W. Nexsen
Counsel for Plaintiff

**VIRGINIA: IN THE CIRCUIT COURT
FOR THE CITY OF PORTSMOUTH
ON THE 13TH DAY OF JUNE, 1985.**

LAW NO. L-83-327

WILLIAM C. McGLONE,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

O R D E R

On March 29, 1985 came the parties and their respective attorneys, and the Court heard evidence and the argument of counsel upon the defendant's Special Plea to Jurisdiction. And having further considered the Transcript of the hearing conducted on March 29, 1985, the memoranda of the parties, and having maturely considered the same, the defendant's Special Plea to Jurisdiction is **SUSTAINED** for the reasons more fully set forth in the Court's letter opinion of May 29, 1985.

Accordingly, this action is **DISMISSED** with prejudice to the plaintiff. It is further **ORDERED** that the Transcript of the evidentiary hearing be made part of the Record in this case pursuant to Rule 5:9 of the Rules of Court.

JA-42

DATE:
ENTER: 6-13-85

/s/ W.H.O.
Judge

I ask for this:
/s/ Richard W. West
Counsel for Defendant

Seen and exception noted:
/s/ Russell N. Brahm III
Counsel for Plaintiff

**VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF NORFOLK**

Docket No. L-86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK & WESTERN RAILWAY CO.,

Defendant.

ORDER

This day came the parties to this action, by counsel, pursuant to defendant's Motion to Dismiss on the basis that Congress has vested exclusive jurisdiction over this matter in the Longshoreman's and Harbor Workers Compensation Act, counsel having fully argued and briefed defendant's motion. The court has fully considered the evidence presented, the briefs and arguments of counsel and has filed its letter opinion dated November 13, 1986 which is incorporated by reference.

For the reasons set forth in the opinion letter, it is accordingly ORDERED that the motion be granted, and it is accordingly ORDERED that this action be DISMISSED WITH PREJUDICE, the plaintiff's exceptions being so noted.

Enter this Order: 12/17/86

/s/ Charles R. Waters, II
Judge

I ask for this:

/s/ John Y. Richardson, Jr. p.d.

Seen and Exceptions Noted:

/s/ Eddie Wilson p.q.

/s/ Bruce A. Wilcox p.q.

JA-44

Filed March 4, 1988

SUPREME COURT OF VIRGINIA

Record No. 841743
Circuit Court No. L-8827-S

NANCY J. SCHWALB,

Appellant,

against

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Newport News on the 22nd day of August, 1984.

For reasons stated in writing and filed with the record, the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for trial on the merits.

This order shall be certified to the said circuit court.

A Copy,
Teste:

/s/ David B. Beach
Clerk

JA-45

Filed March 4, 1988
SUPREME COURT OF VIRGINIA

Record No. 850728
Circuit Court No. L-83-327

WILLIAM McGLONE,

Appellant,

against

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Portsmouth on the 13th day of June, 1985.

For reasons stated in writing and filed with the record, the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for trial on the merits.

This order shall be certified to the said circuit court.

A Copy,
Teste:

/s/ David B. Beach
Clerk

JA-46

April 22, 1988

SUPREME COURT OF VIRGINIA

Record No. 870252

Circuit Court No. L86-335/L2341-86

ROBERT T. GOODE, JR.,

Appellant,

against

NORFOLK & WESTERN RAILWAY COMPANY,

Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Norfolk on the 17th day of December, 1986.

Upon consideration of the record and briefs, and on the basis of *Schwalb v. C & O Railway Co.*, 235 Va. ___, ___ S.E.2d ___ (1988), the Court is of opinion that the judgment appealed from is erroneous. Accordingly, the judgment is reversed and annulled, and the case is remanded to the said circuit court for trial on the merits.

This order shall be certified to the said circuit court.

A copy,
Teste:

David B. Beach, Clerk

By: /s/ Cynthia L. McCoy
Deputy Clerk

33 U.S.C.A. § 902 (West 1986).

Definitions

When used in this chapter—

* * *

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include—

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel;
or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 902(3) (as amended in 1972 by Pub. L. 92-576 but prior to the 1984 Amendments, Pub. L. 98-426)

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C.A. § 905 (West 1986). *Exclusiveness of liability*

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcon-

tractor fails to secure the payment of compensation as required by section 904 of this title.

* * *

45 U.S.C.A. § 51 (West 1986). Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

* * *

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

**VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF NEWPORT NEWS**

LAW NO. 8827-S

NANCY J. SCHWALB,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Defendant.

**TRANSCRIPT OF PROCEEDINGS
Newport News, Virginia
June 6, 1984**

Before:

HONORABLE DOUGLAS M. SMITH, JUDGE

[T:3] (The Court Reporter was duly sworn.)

Court: All right, who is the attorney representing Miss Schwalb?

WILLIAM W. NEXSEN, appearing for defendant.

Mr. Nexsen: Judge, I'm Bill Nexsen; I'm with the firm of Stackhouse, Rowe and Smith in Norfolk, and local counsel, and today we have Miss Frances Li, Frances with an E-S, Li with an L-I. Of the firm DeParcq, Perl, Hunegs, Rudquist and Koenig out of Minneapolis.

We would move her entrance pro hac vice for this purpose only. She would be lead counsel and would represent Miss Schwalb.

FRANCES S.P. LI, appearing for plaintiff.

Ms. Li: Thank you, your Honor.

Court: What's your last name please?

Mr. Nexsen: Mine?

Court: Yes.

Mr. Nexsen: Nexsen, N-E-X-S-E-N.

Court: All right, Mr. West, we're here on your motion, I believe in the special plea to the jurisdiction.

Mr. West: Yes sir.

Court: You want to call some witnesses?

Mr. West: Yes sir, Mr. Overman, Mr. Gross, Mr. McCarthy.

[T:4] Court: Come up, please.

(At this time, the witnesses were duly sworn.)

Court: You all want to separate them?

Mr. West: I don't care. Mr. McCarthy is the company representative. Mr. Overman is my first witness.

Court: Have a seat.

Mr. West: I don't know whether the Court wants any opening comment.

Court: Yes, you might make an opening, please.

Mr. West: We anticipate proving to the Court that Miss Schwalb, who was a laborer in the Mechanical Department in the C and O working in Newport News, that on the date of her accident, she would have been or is covered under the Longshoremen and Harbor Workers Compensation Act. I don't know how much dispute we have as to everything the C and O is required to prove under that act.

The last hearing we had was on the fourth floor in a similar type case and the Plaintiff stipulated that in that case, he was employed by the C and O on the date of the

accident. I don't anticipate there's any problem with that. They conceded that the C and O was an employer, as defined in the act, and the fourth concession was [T:5] that the accident happened upon navigable waters of the United States, how that is defined in the Longshoremen and Harbor Workers' Compensation, I'm prepared to prove all three of them, plus of course the major problem in dispute here is whether she was an employee under the act, particularly I believe according to the status test.

Court: All right.

Mr. West: We're prepared to prove it all.

Ms. Li: We would stipulate the act, C and O was an employer under the Longshoreman's Act at the time of the accident, and we would stipulate too the Plaintiff was injured at the time of the accident, she was employed by the Defendant, C and O, and her injury was in the course of her employment.

However, we would not stipulate to the fact that the accident happened on navigable waters nor will we stipulate to the fact that she was a maritime employee.

Court: All right.

Mr. West: With that in mind then, the C and O will produce evidence as to both tests, the status test and the situs test as it comes under Section 905(a) of the Title 33 of the US Code.

Our evidence will show as a laborer, most of Miss Schwalb's job was to clean out coal, spilled coal from underneath the belts that take the coal from the [T:6] dumpers out to the ships. We will have some photographs to show the Court, show you the relationship of the relationship of the dumpers to the ships. The coal cars are brought into Newport News and down to the dumper where they are turned upside down, the coal falls into a hopper on to belts and the belts transport the coal out to a tower

where they are put aboard ships. This is, the dumper we're talking about is part of the Pier 14 complex at Newport News and Miss Schwalb, at the time of her injury was on the way to clean out coal from under, what are referred to as trunnion rollers; trunnion rollers are what permit the dumper to turn upside down with a car inside of it.

And the coal, which accumulates in the vicinity of the trunnion rollers is not removed, the dumper is not going to turn upside down and the coal loading operation will have to cease.

We will also produce evidence with regard to what Miss Schwalb's job normally was, how much time she would normally spend in various types of activities and we anticipate also producing evidence to show that Miss Schwalb has received to date from the C and O, or at least through the end of May, \$20,409.12 paid to her bi-weekly under the Longshoremen and Harbor Workers' Compensation Act, and other matters relating to her coverage under that act which is administered by the US Department of [T:7] Labor.

Court: All right. Who is your first witness?

Mr. West: Mr. Overman.

Court: Mr. Overman.

M. L. OVERMAN, called as a witness by the Defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

Q You're M. L. Overman?

A That's correct.

Q You're employed by the C and O?

A That's right.

Q In what capacity?

A Electrical foreman.

Q Mr. Overman, were you on duty on January 12, 1983 when Miss Schwalb was injured?

A Yes, I was.

Q In your position as foreman, which [T:8] department are you foreman off?

A Mechanical Department.

Q All right. Did Miss Schwalb come under you in the ordinary chain of command?

A Yes, she did.

Q Did you have occasion to talk to her on that evening when she came to work?

A I assigned her her task for the night.

Q Other than the fact that Miss Schwalb was to be furloughed at the end of that shift, was there anything that she was to do in the next eight hours from the beginning of her shift, that you would consider unusual or not typical of what she normally did when working in the area of the dumper and the pier?

A No.

Q What would you describe as Miss Schwalb's primary job as a laborer in the Mechanical Department working in the area of Pier 14?

A To clean spilled coal from under the belts, trunnion rollers, and off of the towers, loading towers.

Q On the—on January 12, 1983, did you receive a message that Miss Schwalb had been injured?

A I heard it on the radio.

[T:9]Q Did you then go to where she was.

A Yes.

Q Let me show you a photograph and ask you if you can identify what that depicts (indicating).

A Yes, this is a walkway between the hoppers leading to the trunnion rollers.

Q Is that where Miss Schwalb told you she had been injured?

A Yes.

Mr. West: We ask this be marked as Defendant's Exhibit Number One for purpose of this hearing.

(At this time, the photograph was received and marked as Defendant's Exhibit Number One.)

By Mr. West:

Q Now, let me show you two other photographs—let me ask you if you just recognize what's shown in those photographs?

A That's Pier 14, the dumper and tower. And the same here (indicating).

Mr. West: We ask these be marked.

(At this time, the two photographs were received and marked as Defendant's Exhibits [T:10] Numbers Two and Three.)

Mr. West: I ask that the one that has the B marked on it be marked as Defendant's Exhibit Number Two, and the following, Number Three.

Court: All right.

By Mr. West:

Q All right, now for the benefit of the Court and Miss Li, if she would like to see, I'm going to show you what you have identified or what has been marked as

Defendant's Exhibit Number Two and you've identified as Pier 14. Can you show the Court where in that photograph is what is depicted in Defendant's Exhibit Number One. This walkway.

A Yes, it's here in the center of the dumper, center of the dumpers.

Q Would you show the Court where the dumpers are?

A Right here (indicating).

Court: Okay.

A This is the dumper.

Court: That's where it turns it, the car over?

A Yes. This is operator's cab and the walkway is right below it.

Court: Okay.

[T:11] By Mr. West:

Q The walkway is not shown in this photograph?

A No.

Q Underneath the dumper?

A Right.

Q When a car is brought up and turned upside down on the dumper, can you use Photograph Number Three and show the Court what happens to that coal?

A The coal flows by gravity down to feeders that—put it on to the main belts that run out the pier and up on the loading towers and into the ship.

Mr. West: That's all I have of Mr. Overman. Answer Miss Li, please.

CROSS EXAMINATION

By Ms. Li:

Q Mr. Overman, as for Miss Schwalb's primary duties, did you assign her part of that job, sweeping the floors of the office and the yard and other areas as well?

A It takes about 45 minutes in the morning before quitting time.

Q Would you describe the areas of the [T:12] sweeping that she was assigned to do?

A You mean the size of the area or where it is?

Q Where.

A It's the mechanical office that sits near the bulkhead and the shop is directly behind it.

Q Any other areas?

A There's three—the office and the shop and—ordinarily, the third shift laborer where she was working, would sweep out the office, and the eating area next to it. That's called the lunch—in the locker room. That's just before quitting time.

Q Her job as a laborer, that is an unskilled job, is that right?

A Yes, that's it basically.

Q And her duties did not involve the actual loading of coal, did it?

A Well, without her job, loading couldn't continue.

Q You didn't answer my question.

A All right.

Q Did it involve the actual loading of coal?

A No, no.

Q Did it involve the actual unloading [T:13] of coal?

A No.

Q Did her duties involve the operating of the loading machinery and equipment?

A No.

Q She was never required to go aboard the ship as part of her duties, is that right?

A Laborers have been, but she wasn't.

Q That's who I am directing my questions to. Miss Schwalb's duties.

A No.

Q She was never required to go aboard a ship?

A No.

Q Her primary duties then was general clean-up, is that right?

A Clean-up of trash coal. You see, we have other laborers that ordinarily clean the locker rooms and equipment. This is just something for general housekeeping before the next shift comes on.

Q Do you know which Union she belongs to?

A Unit?

Q Union.

A Union?

[T:14]Q Yes.

A Laborers' Union.

Q Do you have the name?

A Oh, no.

Q That is not a Longshoremens' Union in any event, is that right?

A Not that I'm aware of.

Q She was governed by the same operating and safety rules that would govern other laborers in the C and O system, is that correct?

A Yes, I'd say so.

Q As foreman, who assigned duties to the laborers under the Mechanical Department, you would agree that keeping the facilities clean would be one of the functions of the C and O Railroad, is that right?

A Keeping the facilities clean?

Q Clean-up, yes.

A Yes.

Q That includes not only the piers, but the office, the yards, the junctions and areas in the railroad facilities, is that correct?

A Are you talking laborers in general, or her specific job?

Q I'm talking in general.

A In general, laborers do, yes.

[T:15]Q And this clean-up duties then is not unique to the pier area, is that right?

A Well, that's the only place they clean up trash coal.

Q Her duties did not include only cleaning up trash coal?

A Laborers can be assigned to various duties.

Q I understand that.

A For instance, one man is assigned, one laborer is assigned to just clean the locker rooms, but if a person is assigned to a certain section, each night or each shift, then that's his job for that shift.

Q The laborers' clean up duties that involved, they involved the whole facility, not only just on the pier?

Mr. West: I think—my problem is we're going back and forth from what Miss Schwalb's duties were as opposed to what a general laborer's duties is. I don't think Mr. Overman understands when the switch is made.

Court: Let's make it clear, when you're talking about laborers in general or talking about Miss Schwalb.

Ms. Li: I'm talking about clean-up duties in general.
[T:16]A The clean-up duties of laborers are the position to which they are assigned.

By Ms. Li:

Q The clean-up duties of laborer include the whole facility, is that right?

A Just the Mechanical—the Mechanical Department laborers have an assigned section they clean. The transportation has their own laborers that clean other sections.

Q How far in terms of feet or yardage is the dumper from the shore line on water edge?

A Not more than three hundred foot, I would think.

Q And how far is the pier, specifically Pier 14, how long is that pier?

A Mr. Gross could probably could answer that. I really - I'd say probably 1200 foot, but that's a guess. I've seen it, but I can't remember.

Ms. Li: That's all I have. Thank you.

REDIRECT EXAMINATION

By Mr. West:

Q Mr. Overman, let me ask you a couple [T:17] of more. Now, I'm confining my questions to the specific duties of Nancy Schwalb. Did she have any laboring duties at a junction?

A No sir.

Q Did she work up in the yards?

A No.

Q On this particular evening that she was injured, let me rephrase that. You mentioned before in answer to Miss Li's question and in answer to mine, that the sweeping duties in the office and the eating area, the machine shop, would consume about 45 minutes?

A That's right.

Q Is that 45 minutes out of an eight hour shift?

A Yes.

Q What would she be doing in the other seven hours approximately, seven hours and 15 minutes?

A Other than 20 minutes for lunch, she would be cleaning coal.

Q Now, would this be between the dumper and the end of the pier?

A Right.

Mr. West: That's all I have.

RECROSS DIRECTION [sic]

[T:18] By Ms. Li:

Q One more question. When you say clearing coal, can you describe in more detail? How does she clear coal?

A They have a shovel and they also have a scraper, a piece of metal attached to the rod that they rake the coal.

Q And what happens to the coal?

A The coal falls to the dock where it's cleaned up again. Put back on the belts.

Q She had no duties as far as putting the coal back on the belt?

A No.

Ms. Li: That's all I have. Thank you.

Mr. West: As a matter of fact, Mr. Overman, once a Mechanical Department laborer takes the coal and puts it on the ground, because of Union restrictions, she is not permitted to pick that coal up off the ground, is she?

A That's right.

Mr. West: It's the laborer in the Transportation Department that has to come and do that?

That's correct.

Court: No wonder we lose money at the [T:19] ports. You can step down.

Mr. West: Mr. Gross.

W. C. GROSS, called as a witness by the Defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

Q You're W. C. Gross, is that correct?

A That's correct.

Q And you're employed by the C and O?

A Yes sir.

Q In what capacity?

A General foreman, Mechanical Department at the coal piers.

Q Does that put you just over top of Mr. Overman in the ordinary chain of command?

A Yes sir.

Q And you work at the coal piers at Newport News?

A Yes sir.

[T:20]Q Mr. Gross, could you give us your estimate of the distance between dumpers at Pier 14 and the edge of the water of the James River?

A I'd say approximately 300 feet.

Q Would you describe the area between the dumper and the water's edge as an extension of Pier 14?

A Absolutely.

Q I want to show you these photographs we talked about before. You have some familiarity with the area that Miss Schwalb said she was injured at?

A Yes sir.

Q That's shown in Photograph Number One?

A Yes sir.

Q Can you also show the Court in Photographs Two and Three, where the walkway shown in Photograph Number One is located?

A This area of the dumpers right here (indicating).

Q Can not be seen in the photograph?

A Can not be seen in the photograph.

Q And on Photograph Number Three, can you show it?

A The same general area, but can not be seen in this photograph.

Q The distance between where Miss [T:21] Schwalb was injured and the edge of the water is approximately 300 feet?

A I would say so.

Q Are you—we've spoken before of the trunnion rollers which is what Miss Schwalb was on her way to clean coal from beneath. What are the trunnion rollers?

A Trunnion rollers are what support the dumper on the end ring of each dumper, there's a rail and this rail rolls around these trunnion roller wheels in order for the dumper to turn over.

Q And how does the coal get there such as Miss Schwalb was on the way to clean out?

A Well, it's one of those unavoidable spills that gets in between the dumper and down in the trunnion rollers and it's necessary to clean this coal out for the operation.

Q Does the spill occur when coal is being loaded aboard ships?

A Yes sir, when the cars are turned over and the coal falls out of the cars.

Q Now, if no one was assigned the duty of removing spilled coal from the area of the trunnion rollers, what would be the effect—be the effect, if any, on the coal loading operation?

[T:22]A Well, it very seriously effects the operation because the dumpers are not free enough to turn and it also causes undue repair.

Q Are you familiar with whether coal was in fact being loaded off of Pier 14 at the time Miss Schwalb was injured?

A I don't quite follow that.

Q Do you know whether coal in fact was being loaded aboard?

A No, I don't know. I wasn't on duty.

Q You are familiar with the ordinary tasks of someone performing the job that Miss Schwalb was performing January 12, 1983?

A Yes sir.

Q Can you give us your best estimate of the percentage of time that a laborer would be removing spilled coal between the dumper and the end of the pier during an eight hour shift?

A I'm sure it's in excess of fifty percent of the time. If the pier is operating; on the opposite side, it's not operating, they have duties to pull this coal away from under belts and trunnion rollers on the opposite side and the side that is operating, at various times during the shift, it's necessary to pull these rollers or get this coal under these trunnion rollers on the side that is operating.

[T:23]Mr. West: Answer Miss Li, please.

CROSS EXAMINATION

BY Ms. Li:

Q Mr. Gross, the dumper is not located on the pier, is that right?

A It's not on the pier itself, no.

Ms. Li: May I have one moment, your Honor.

(At this time, Ms. Li conferred with Mr. Nexsen.)

Ms. Li: That's all I have.

Court: All right, thank you, sir. You may step down.

Mr. West: Mr. McCarthy.

JOHN F. McCARTHY, called as a witness by the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

[T:24]Q Tell us your name, please.

A John F. McCarthy.

Q Employed by the C and O?

A Yes sir.

Q In what capacity?

A My title is Senior Claim Agent.

Q In that capacity, have you handled the claim of Miss Schwalb against C and O for injury on January 12, 1983?

A Yes sir.

Q I hand you a document and ask if you can identify it?

A Yes, that's the Longshoreman Harbor Workers' Form LS201 which is the employee's first notice of injury.

Mr. West: I ask that be marked as Defendant's Exhibit Number Four.

(At this time, the document was received and marked as Defendant's Exhibit Number Four.)

By Mr. West:

Q Is Exhibit Number Four one of the initial documents that are filed with the US Department of Labor to bring the claim under the Longshoremen and Harbor Workers' Compensation Act?

[T:25]A Yes, it is.

Q Would you read in item 17 over the signature of Nancy Schwalb and the date of January 14, 1983, what that says?

A "I am requesting the employer named in item seven to provide me appropriate compensation and medical care for my injury and I hereby make claim for all benefits to which I may be entitled under the Longshoremen and Harbor Workers' Compensation Act or a related law."

Court: What paragraph was that?

Mr. West: 17.

By Mr. West:

Q And under that act, has the C and O paid monies to Miss Schwalb since the date of her accident?

A Yes sir.

Q Payments every two weeks?

A Bi-weekly payments.

Q And through May 29, 1984, how much money has the C and O paid to Miss Schwalb under the act?

A \$20,409.12.

Q Are payments current?

A Yes.

Q She still is receiving payments?

A That's correct.

Q Does the US Department of Labor [T:26] under this act have a rehabilitation program?

A Yes.

Q Are you familiar whether Miss Schwalb was in contact with the US Department of Labor to obtain rehabilitation services?

A Yes, I have received correspondence from the office of Workmens' Compensation Program, Miss Schwalb has been in contact with Mr. Gerald Wright, who is the rehabilitation specialist for the Workmens' Compensation Programs.

Mr. West: Answer Miss Li.

Ms. Li: I have no questions.

Court: Thank you, sir. You may step down.

Mr. West: That's the Defendant's evidence in support of its special plea.

Court: The Defendant rests.

Ms. Li: Your Honor, I'd like to call Miss Nancy Schwalb.

Court: All right.

NANCY SCHWALB, called as a witness in her own behalf, having been duly sworn, testified as follows:

[T:27] DIRECT EXAMINATION

By Ms. Li:

Q Your name is Nancy Schwalb?

A Yes.

Q And you're the Plaintiff in this case?

A Yes.

Q You were injured on January 12, 1983 while you were performing duties for the C and O Railroad?

A Yes.

Q Would you please tell the Court the duties that you were assigned to, that night?

A That night I was assigned, they had just shut down the coal pier, so I was assigned to do a specially thorough cleaning of trunnion rollers, make an inspection of the tower, and continue the duties that I have every night, which were sweeping the shop, sweeping the locker rooms, sweeping the office, the oil house, and the lunch area.

Q Let me back up a bit. What shifts did you work?

Q The third shift.

Q That is from what hours?

A 11 p.m. to seven a.m.

[T:28]Q Would you please tell the Court how much time you spent in—on an average day, how much time you spent on a given job you just described?

A Okay, they had just—well, the jobs clearing the coal from the tower and the dumper only take, combined, only take an hour or two in the shift. And then they had, just because of that, just assigned several other clean-up duties to the third shift laborer in order to fill out the shift. So they had filled out the shift with about another six hours of sweeping up and cleaning up in the locker rooms, in the office and in the shop.

Q Did your duties include work on the pier?

A Not on the—walk out to the pier to get to the tower.

Q The tower is on the pier?

A Yes.

Q How much time do you spend working or clearing coal from the tower?

A Well, the job that I do on the tower is mostly cleaning the coal from underneath the shuttle belt and that can only be done when the machinery is not running. They only shut the machinery down for half an hour during the shift change so it's only about a half hour that I spend on the tower.

[T:29]Q How about working on the dumper area?

A The dumper area, it takes an hour to two hours.

Q And the remaining time of your work, you're involved in what?

A Sweeping and cleaning, like I said, there had just been normally the laborers didn't have much to do on the

third shift, so they had just filled out the duties of the third shift laborers with a lot of clean-up duties.

Q At the time of your injury, were there loading activities on Pier 14?

A No. They weren't loading any coal. They had just shut down.

Q Where you ever assigned to load or unload coal?

A No.

Q Were you ever assigned to operate any of the machinery?

A No.

Q Which Union do you belong to?

A The International Brotherhood of Firemen and Oilers.

Q And is that a Railroad Union or Longshoremens' Union?

[T:30]A Railroad Union.

Q Have you ever been aboard a ship?

A No.

Q You received Longshoremen Workers' Compensation, is that right?

A Yes.

Q Do you have any other income aside from that benefit?

A No.

Q Tell me why did you accept the benefits?

A Well, I started getting the checks before I had gotten a lawyer, and I had no idea that I had any choice other than that, and I had no income whatsoever. I had been

in the hospital for a while and I had a lot of bills to take care of, and I needed it just to live on.

Ms. Li: That's all I have. Thank you.

CROSS EXAMINATION

By Mr. West:

Q Miss Schwalb, are you willing to give the C and O back its \$21,000 approximately that you received over the last better than a year?

[T:31]A If they would give me some other form of compensation, yes.

Q I see. Have you seen Exhibit Number Four, the document L-201 Form?

A Yes.

Q Is that your signature on there?

A I believe so, but on January 14, I was still in the hospital.

Q In fact, January 14, you came back to the C and O and filled out your required accident report, didn't you?

A From my medical records, I was still in the hospital.

Q Let's not talk about your medical records. Let's talk about what you remember. Did you sign out of the hospital for a short period of time while you were in it and come back to the C and O and fill out your accident report form?

A No.

Q You did not? Is this your signature or is it not?

A I'm pretty sure that's my signature, but I know I was in the hospital on the 14th.

Q With everyone of those checks you received over the past almost a year and a half, you get a [T:32] letter that's signed by Mr. McCarthy, don't you?

A Yes.

Q That letter tells you this check is payment for you under the Longshoremen and Harbor Workers' Compensation Act?

A Yes.

Q And you received, when did you hire a lawyer?

A Several months after I had been injured.

Q So you received a fair number of these checks since you hired a lawyer?

A Yes.

Q Did you ever send any of them back?

A I can't.

Q You can't send them back?

A No, I have nothing to live on other than those checks.

Q I understand. You think you're different than any other employee injured while working for the C and O?

A I don't understand what you mean.

Q Well, a lot of people do get injured while working for the C and O, have no source of income and don't get paid under the Longshoremen's Act; do you feel you're entitled to more than those people?

[T:33]A No.

Q Your attorneys have never told you to send one of these checks back, have they?

A No.

Q In fact, during the—since the date of your accident, you have changed your residence—your mailing address, have you not?

A Yes.

Q You went to Mr. McCarthy, asked him to change the address for you to receive the checks?

A Yes.

Q And on two occasions, the checks got lost in the mail, I believe. You went to Mr. McCarthy, told him you wanted new checks issued?

A Yes.

Q And he did?

A Yes.

Q Would you take either Exhibit Two or Three, the overall aerial views. Let's take Number Two. I assume you recognize what's shown in that photograph?

A Yes.

Q Would you show the Court where the office is that you sweep?

A This brick building here (indicating).

Q Would you say that the total size [T:34] of that office is slightly bigger than this Courtroom?

A Around the same size.

Q And where it's showing—show where the locker room is?

A The building right to the left (indicating).

Q How does the size of the interior of the locker room compare with the size of this Courtroom?

A Around the same size. Slightly bigger.

Q And how about the shop, would you show the Court where the shop is?

A This building here (indicating).

Q How big is the shop compared to the size of this Courtroom?

A I think it's a little bigger.

Q Okay. Would you say that it is accurate to describe the total area of the shop, the locker room and the office, as being say, four times the size of this Courtroom?

A Yes, for those three buildings, yes.

Q And each night you sweep them out?

A Those and two others.

Q And two others?

A Yes.

[T:35]Q What are the other two?

A The oil house.

Q How big is the oil house compared—

A The oil house is smaller than the Courtroom.

Q Can you show the Court where the oil house is?

A This building here (indicating). My duties were never more than sweeping it. And then another locker room. This other building here.

Q All of those in the same proximity to each other, doesn't require long walk to get from one to the other?

A No, my duties in those two buildings required more than sweeping.

Q Total of six hours you spent in those areas?

A Yes.

Mr. West: That's all I have.

REDIRECT EXAMINATION

By Ms. Li:

Q What other duties besides sweeping were you engaged in in those two buildings?

[T:36]A Well, in the oil house, I had to clean up any spilled oil which takes quite a while and then in the women's locker room, I had to do a complete clean up, I had to clean the sinks, commodes, showers, floors, that's about it in the women's locker room.

Q You work on the third shift, is that right?

A Yes.

Court: I'm sorry. What was the question?

By Ms. Li:

Q You worked on the third shift, is that right?

A Yes.

Q Did the—was there—excuse me, was there coal being loaded on an average third shift, not on the day of the accident, but on the third shift?

A Yes.

Q And when coal was being loaded, you would not be able to work underneath the trunnion rollers, is that right?

A No, I could work under the trunnion rollers when the coal was being loaded, but I couldn't work on the tower or on any of the belts.

Ms. Li: That's all I have.

[T:37] RECROSS EXAMINATION

By Mr. West:

Q Miss Schwalb, where does the spilled coal come from?

A From the coal cars in the trunnion rollers comes from the coal cars.

Q This occurs when the coal cars are turned upside down and the coal is dumped into the hoppers?

A Yes.

Mr. West: That's all I've got.

Ms. Li: Thank you.

Court: Would you say that—how many days a week do you work?

A Five.

Court: Of those five days a week, how many of those five days do you work six hours cleaning, sweeping, cleaning up oil, 20 minutes for lunch, which leaves you an hour and 45 minutes to do coal, how many days do you do that?

A All five.

Court: All five?

A Yes, I formerly had a job that was nothing but sweeping the shop, took an eight hour shift on the former job of mine.

[T:38] Court: All right. Thank you. All right, anything else, Miss Li?

Ms. Li: Not for evidence, your Honor, unless you—you would hear some oral argument.

Court: All right. All right, Mr. West.

Mr. West: I'd like to bring Mr. Overman back to make a point.

Court: All right.

* * *

M. L. OVERMAN, recalled as a witness by the Defendant in rebuttal, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

Q Mr. Overman, to your knowledge, as foreman in the Mechanical Department of C and O at Newport News, in January of 1983, did you have any laborer in your department working the third shift who spent six hours of eight hours sweeping up and cleaning up in an oil room?

A No, that—I mean—I wouldn't—no.

[T:39] Mr. West: That's all.

Court: All right.

Ms. Li. No questions.

* * *

JA-78



**VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH**

LAW NO. L-83-327

WILLIAM T. MCGLONE,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Portsmouth, Virginia

March 29, 1985

Before:

HONORABLE LESTER E. SCHLITZ, CHIEF JUDGE

* * *

[T:13] ROBERT E. LAYNE, JUNIOR, called as a witness by the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

RICHARD WRIGHT WEST, appearing for defendant.

By Mr. West:

Q State your name, please.

A Robert E. Layne, Junior.

Q And by whom are you employed, Mr. Layne?

A By the Chessie System.

Q And what is your position with Chessie?

A Electrician.

Q And what department do you work in at Newport News?

A Mechanical Department.

Q Do you know the Plaintiff, William McGlone?

A Yes sir, I do.

[T:14]Q He works also for C & O?

A He did at the time, yes.

Q All right. You mean at the time of his accident?

A Yes.

Q What was his job?

A He was a laborer to clean up spilled coal around the belts on the towers.

Q What was his—what department did he work in?

A He worked in the Mechanical Department.

Q Did he work under you?

A Yes, he did.

Q Was he working under your authority on February 1, 1983, when he was injured?

A He was.

Q Would you tell the Court where he was working when he was injured?

A He was under the dumper cleaning coal off of the belt between one and three main belts.

Q What would you describe as Mr. McGlone's primary job as a laborer in the Mechanical Department at Newport News?

A His primary job was to keep, [T:15] clean up spilled coal.

Q Where would this spilled coal be located?

A Well, between the belts under the dumpers and on the towers.

Q What percentage of an average eight hour shift would you say Mr. McGlone would spend in cleaning up spilled coal between the dumper and the towers?

A I would say a little over fifty per cent of his time was contributed to that.

Q I'm going to show you a photograph, and ask if you can identify what's shown. Show it to Mr. Brahm first.

(At this time, the photograph was shown to Mr. Brahm.)

By Mr. West:

Q Can you identify what's shown on the photograph?

A These are the dumpers that—where they dump the coal for loading the ships at Pier Fourteen.

Mr. West: I would ask that be marked as Defendant's—

Court: I'll mark it as Defend[T:16]ant's Exhibit Number One for the purposes of this proffer.

(At this time, the photograph was received and marked as Defendant's Exhibit Number One.)

By Mr. West:

Q Now, if we can get it so you can show the Judge what you're talking about. Can you stand up, Mr. Layne?

A Sure.

Q In this fashion, would you show the Court where the towers are?

A Well, this is your loading tower right here (indicating).

Q What is this water?

A This is the river.

Q Which river?

A James River. This is the pier.

Q What does the tower do; what's its purpose?

A The purpose of the tower is to distribute coal all over the ship or barge, whichever it may be.

Court: Who employed this man, [T:17] do you know?

A Who employed Mr. McGlone?

Court: Yes.

A C & O.

Court: C & O Railroad?

A Yes.

By Mr. West:

Q What is the tower located on?

A It is located on the pier itself.

Q All right. Would you show the Court, use it with this pen, by drawing an arrow, well, first, can you see in this Exhibit Number One the place where Mr. McGlone was when he was injured?

A Not according to this picture, you can't see. But you can get the vicinity in which he would be.

Q Why is it you can't see it on this photograph?

A Because he is on ground level, and you can't see through all of that.

Court: You say ground level?

A In other words—

Court: What was under his feet, dirt or piling or what?

[T:18]A No, concrete.

Court: Concrete?

A Yes sir.

Court: Is that concrete on land or water?

A Land.

By Mr. West:

Q Would you draw an arrow to the location which is shown above where Mr. McGlone was when he was injured?

A Mr. McGlone was under -

Q Under where you show it?

A Under where the arrow is shown, yes.

Q What is the—what is around that, what is this long thing, both of them next to the end of that arrow?

A This is the incline; these are the dumpers right here, and this is the operator's cab (indicating).

Q Would you explain to the Court, using this photograph, how coal is—how coal gets from coal cars, railroad coal cars onto, say, this ship or barge that's shown in the photograph?

[T:19]A Well, the cars are pulled up this incline, placed on the dumper, turned completely over, into a hopper, which is fed out to the—on the main belts.

Q Where are the main belts?

A This—are your main belts right here (indicating). This is number one and number three (indicating).

Q When the cars are turned over at the dumper, and the coal, by gravity, is dropped down, is it one continuous movement in there to the ship?

A Yes, it is.

Court: All right, sir.

By Mr. West:

Q Now, what is the distance, if you know, from the place where Mr. McGlone was injured to the edge of the water of the James River?

A I would say between two hundred fifty to three hundred feet.

Q Okay. And tell us specifically what it was that Mr. McGlone was doing when he was injured?

A Well, there was some spillage of coal between the belts and the ground, which would shift the belt over and make it run to one side, which would cause more spillage. And he was cleaning that coal out at the time, and he got his arm caught in the belt and the roller.

[T:20]Q Was coal being loaded aboard a barge at the time this happened?

A I do believe it was a barge.

Q Some sort of a vessel?

A Either—I would say there was a ship on one side and a barge on the other.

Q All right. Now, what would occur if the spilled coal in this instance would not be removed?

A Well, you would have damage to the belt, and you would eventually have to shut down your operation to clean it up, which would take twice the time delay.

Q Did Mr. McGlone, while working under you, have any duties that were away from the pier area?

A Not while working for me, he did not.

Q Ever work up in the general yard?

A Not for me, he didn't.

Court: Who do you work for?

A I work for the C & O.

By Mr. West:

[T:21]Q Did Mr.—was Mr. McGlone ever called upon to clean an office or empty trash cans?

A Only on occasions when there was no ship or coal to be cleaned up, he would be asked to sweep the office floor or empty the trash can.

Q Routinely, without specific instructions, would Mr. McGlone's duties include cleaning up an office or emptying trash cans?

A No.

Mr. Brahm: Is that while working for you or working for other people?

A Well, any time.

RUSSELL N. BRAHM, III, appearing for plaintiff.

Mr. Brahm: How can you say what other people—

A I can't tell what the other man -

Court: You'll get a chance to cross examine him.

By Mr. West:

Q Talking about this job, Mr. McGlone was performing and had performed before—

A Right.

Q Did it include as a routine, without specific instructions, cleaning offices or trash cans?

A No, it was not a routine job.

[T:22]Q Do laborers, such as the job Mr. McGlone had, ever go aboard ships?

A On special occasions they may be asked to go to clean coal off of a beam on the boom.

Q So, again, that would be cleaning spilled coal?

A That's cleaning spilled coal.

Mr. West: Answer Mr. Brahm, please.

CROSS EXAMINATION

By Mr. Brahm:

Q Mr. Layne, you worked for the railroad about thirty-eight years, haven't you?

A Yes.

Q You consider yourself a good employee, don't you?

A I hope so.

Q Okay. How long did Mr. McGlone work for you, sir?

A Maybe three or four months.

Q Okay. So you don't know really what he did prior to that three or four months, do you?

A Well, I had seen him around.

[T:23]Q But you don't know what his specific duties because he worked for someone else, isn't that true?

A He did.

Q Now, isn't it true that when Mr. McGlone was injured the belts were running at that time?

A Yes.

Q Are you familiar with the Safety Rule 196, sir?

A Yes sir.

Q I show you Rule 196, and ask you if you can read it for the record, please.

A "Before performing"—

Mr. West: We would note our objection to the evidence, whether we violated the safety rule or not, has nothing to do with the issue of Longshoremen's and Harborworkers' Compensation Act.

Court: Overrule your objection, and allow you to read it in the record for a proffer.

A "Before performing any work on conveyor belts or rollers or stepping on or across belts, employees must take necessary precautions to assure that such equipment is stopped and that movement is not resumed until work has been completed and all employees are in the [T:24] clear."

By Mr. Brahm:

Q You were with Mr. McGlone at the time he was injured, isn't that true, or shortly before that time?

A Yes, I was.

Q And you instructed Mr. McGlone to clean out underneath the belt while it was moving, did you not?

A I asked him to clean the coal out, yes, I did.

Q And the reason why the belts were moving was because the belts were indirectly loading the barge Maryland or that other ship at that time?

A True, they were directly loading the ship.

Court: Did he have anything to do with the actual putting the coal on the belt, or was he just cleaning it out when it dropped off?

A No sir, he does not have anything to do with putting it on the belt.

Court: He wasn't loading that coal; he was cleaning up the debris?

A He was cleaning it up.

Court: All right, sir.

[T:25] By Mr. Brahm:

Q And he doesn't put that coal he cleans up back on the belt, does he?

A No sir, that comes under another department.

Q Now, you never saw Mr. McGlone go aboard a ship, did you?

A No, I can't say that I have.

Q You never ordered him to go aboard a ship, did you?

A No.

Q You never ordered him to clean any spilled coal from any of the ships, did you?

A No.

Q When was it you first learned that Mr. McGlone was injured?

A When we heard him holler.

Q What did you do then?

A We went around to see what was the trouble.

Q Did you have the belt cut off?

A Well, at the time I couldn't say that they were or they weren't. I really don't remember.

Q But the belts were running at the time Mr. McGlone was injured?

[T:26]A Right.

Mr. Brahm: I don't have any other questions.

I do have one other question.

By Mr. Brahm:

Q Can you identify this (indicating)?

A No sir, I've never seen it before.

Mr. Brahm: Okay. I would like to offer this as—

Court: What is it? If he hasn't seen it, how can you offer it?

Mr. Brahm: Notice to employees under coverage of the Longshoremen's and Harborworkers' Compensation Act.

Mr. West: We object.

Court: Are you going to be a witness to testify what this is?

Mr. Brahm: From a negative—

Court: I sustain the objection.

Mr. Brahm: I was just going to say—

Court: I sustain the objection.

Mr. Brahm: I don't have any other [T:27] questions.

Court: All right. You can step outside.

Mr. West: Mr. Gross.

WILLIAM C. GROSS, called as a witness by the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. West:

Q Tell us your full name, please.

A William C. Gross.

Q By whom are you employed?

A Chesapeake and Ohio Railway Company.

Q Your position?

A General Foreman in the Mechanical Department.

Q As such, is Mr. Layne underneath you?

A Yes sir.

[T:28]Q And would Mr. McGlone have been under him?

A Yes sir.

Q What was Mr. McGlone's job in the area of February 1, 1983?

A He was employed as a laborer in the Mechanical Department.

Q What is the primary job of a—

Court: Employed by whom, sir?

A Chesapeake and Ohio Railway Company.

By Mr. West:

Q What is the primary job of a laborer in the Mechanical Department of C & O in Newport News?

A To clean up trash coal as we call it, coal spillage off the belts, and so forth, from loading coal.

Q Do you have some estimate of the percentage of time that a laborer in the Mechanical Department of C & O at Newport News, such as Mr. McGlone, would have spent in cleaning up spilled or trash coal?

A Yes sir, well in excess of fifty per cent of his time.

Q Were you present when Mr. [T:29] McGlone was injured February 1, 1983?

A No, I was not.

Court: You keep any records what per cent of time he works during that against other time?

A No sir.

Court: Mr. McGlone, specifically, you got any records of what time he does that and what time he does his other duties?

A No sir.

Court: You're speculating as fifty per cent, well over fifty per cent, are you?

A Well, the laborer's job—

Court: Talking about Mr. McGlone.

A I'm speaking of the laborer in general.

Court: I want to know about Mr. McGlone.

A He was employed as a laborer to clean up trash coal.

Court: Do you have any records or any knowledge of how much time he spent—

A No sir.

By Mr. West:

[T:30]Q You have such records on any laborer?

A No sir.

Q Are you aware of the place that Mr. McGlone was when he was injured?

A Yes sir.

Q Do you know the distance from that place to the edge of the water of the James River?

A Approximately three hundred feet.

Q And what is—between where Mr. McGlone was injured and the edge of the water of the James River?

A Well, it's the dumper and the main belt drive for the belts, and the belt structure.

Q What is the—what happens from the time that the coal cars are turned upside down at the dumper, and

dropped by gravity, until that coal gets aboard a ship or barge?

A When the cars are turned over on the dumper, the coal free falls into a hopper, it's fed by feeder belts onto the main belt. The main belt takes it out the pier from under the dumper, up the incline to the tower, where it's dumped onto the shuttle belt. From there the shuttle belt is able to carry the coal from either side to [T:31] either side of the pier, north or south side. From there it's dumped onto the boom belt and off the boom belt down through the chute into the hold of the ship.

Q From the dumper to the pier, is that a straight line?

A Yes sir.

Q Is the movement of the coal from the dumper to the tower and then onto the ship one continuous movement while loading is going on?

A Yes.

Q Now, what happens if the spilled coal or the trash coal is not removed?

A Well, good possibility if it gets bad enough, it can cause damage to the equipment; therefore, it can be—could be a major catastrophe, and cut you down where you can't operate at all.

Court: What happens to the coal that's spilled? Is that used again?

A It's cleaned up, picked up and stored, and put back in cars. I don't know how it's disposed of or where it goes once it's put back in cars.

Court: Not thrown away as trash?

A Trash coal is an expression.

Court: I'm talking about the [T:32] coal itself, it's used somewhere again?

A Yes.

Court: Have you ever done this kind of work yourself?

A No sir, not primarily employed for it, no.

Court: You have never done it either. Have you ever done cleaning?

A I've used a shovel and a pick, and so forth, but it's not my primary job.

By Mr. West:

Q Do laborers in the Mechanical Department of the C & O at Newport News go aboard ships?

A They have done it.

Q For what purpose?

Court: How about Mr. McGlone?

A I couldn't tell you anything specifically about Mr. McGlone. Whether he has been aboard a ship or not.

Mr. Brahm: I'm going to go ahead and object to any question—

Court: I object to what laborers, some laborers do, because—I sustain the objection to that. It's what Mr. McGlone's duties were.

By Mr. West:

[T:33]Q You're not aware of whether he ever did go aboard a ship?

A I have no personal knowledge of it, no sir.

Q Have you ever been aboard a ship with a laborer by the name of John Fox to clean up coal?

Mr. Brahm: I object to that.

Court: Sustain the objection.

Mr. West: I understand Mr. Fox is going to be a witness.

Court: It's what this man's duties are.

Mr. Brahm: I may not call him as a witness.

Mr. West: Then it is irrelevant.

Court: I sustain the objection. It's regarding this particular man's duties.

Mr. West: We except to that. I don't agree it's limited to just what this specific man did.

Court: I overrule your objection. it is what this man was doing and what he was doing that is important here.

Mr. West: As long as I have [T:34] my exception.

Court: All right.

By Mr. West:

Q Other than when he might be—Mr. McGlone might be specifically assigned to clean an office, empty trash cans, what did he do?

A If the pier wasn't operating, he had the towers to clean up; he had the trunnion rollers to take care of and the spilled coal on the walkways on the dumper.

Q Where are the towers located?

A Offshore.

Q On the pier?

A On the pier.

Mr. West: Answer Mr. Brahm.

CROSS EXAMINATION

By Mr. Brahm:

Q In addition to cleaning the spilled coal, Mr. McGlone would also be required to clean offices out, would he not?

A Occasionally.

Q In addition to cleaning offices out, wouldn't he be required to clean out portions of the [T:35] shop and the locker rooms?

A Occasionally.

Q Isn't it true he would also be required to clean out the restroom of the office spaces that he would be working in or other people would be working in?

A Not the office, but the locker rooms, probably.

Q Now, at the time of this accident, February 1, 19—1983, did the Chessie System have certain safety rules that were in force?

A Yes.

Q I show you a copy of the safety rules here, and I'd like to ask you if you would read Rule 196.

Court: Hasn't that—

Mr. Brahm: That was the other—that wasn't introduced either.

Mr. West: My same objection to the relevancy.

Court: All being proffered, so I overrule your objection. Go ahead.

A Rule 196 states, "Before performing any work on conveyor belts or rollers or stepping on or across belts, employees must take necessary precautions [T:36] to assure that such equipment is stopped and that movement is not resumed until work has been completed and all employees are in the clear."

By Mr. Brahm:

Q Was this safety rule in effect at the time of this accident?

A Yes sir.

Q What is the reason for having the belts stopped before any employees work underneath it?

A For safety sake.

Mr. Brahm: Judge, we'd like to offer this as Plaintiff's Number One.

Court: Received over his objection as Plaintiff's Exhibit One.

(At this time, the document was received and marked as Plaintiff's Exhibit Number One.)

By Mr. Brahm:

Q Now, if the belts were not running, then the barge or the ship that was being loaded couldn't be loaded, is that true?

A That's true for that particular side, yes.

Q So if the belts were stopped, in accordance with the safety rules, then the ship wouldn't [T:37] be loaded?

A Not for that period of time.

Q Now, how long did Mr. McGlone work for you, sir?

A I don't have any record of that. I don't know what his employment dates were.

Q Mr. Layne testified he worked approximately four months for Mr. Layne. Would that refresh your recollection, or would that give you some idea how much time he worked for you?

A Well—

Q Mr. Layne worked for you?

A For the same period of time, for that same period of time, it would still—

Court: You say you don't know. I don't think you can ask him what somebody else said.

Mr. Brahm: The only reason I did that, I thought since Mr. Layne worked for Mr. Hamilton or Mr. Gross, that perhaps he could probably—but if you don't know of your own free knowledge—that's all the questions I have.

Court: Anything further?

Mr. West: Nothing further.

Court: You're excused, sir.

Mr. West: That concludes the [T:38] C & O proffer of evidence.

. . .

[T:67] WILLIAM C. McGLONE, called as a witness in his own behalf, being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Brahm:

Q Mr. McGlone, will you please state your address, for the record?

A 1035 - 41st Street, Newport News, Virginia.

[T:68]Court: What's your name?

A William C. McGlone.

By Mr. Brahm:

Q Mr. McGlone, on February 1, 1983, by whom were you employed?

A C & O Railroad.

Q I see. And what were you doing, what kind of job did you have with the C & O Railway?

A Laborer. Janitorial work.

Q When did you begin working for the C & O Railroad, sir?

A '70.

Q Would you briefly tell the Court what type of jobs you had from 1970?

Court: What were you doing on this particular day you were hurt?

A I was on Pier Fifteen side, was cleaning up. Like they have Pier Fifteen, they shut down, they clean up the motor room and the big room in there. You got to sweep the floor and get the paper over on that side.

And Mr. Layne called me on the radio to meet him on the dumper over on Pier Fourteen. And he asked me when I got over there, he asked me would I clean out the belt over there, number three belt. And I told him, I said, I asked him to shut it down, which I asked him that [T:69] on the radio, and—

Court: You went over to clean it out. What were you supposed to clean out on the belt?

A The coal spilling.

Court: Falling off the belt?

A The belt was torn, three or four inches torn off, and it was falling down underneath that.

Court: Was that a job you generally did?

A No sir.

Court: What was your work totally, what do you do from day to day?

A From day to day, we clean up most bathrooms, bunkhouse, they didn't—even need us at Pier Fourteen. They would come and get us to send us to the—just to the bunkhouse, making up beds, clean up the caboose, engine and things like that.

By Mr. Brahm:

Q During that period of time, was there a lot of coal loading on ships?

A I don't know. I think they was loading, I don't know for sure what they were loading out there. They had a lot of work coming in and out at that period of time.

[T:70]Q Mr. McGlone, were you ever required, as part of your duties to go aboard a ship?

A No, never have.

Q Where you ever required, as part of your duties, to load any coal aboard any ships?

A No

Court: You ever load coal on the belts?

A No sir.

By Mr. Brahm:

Q What would you do with this spilled coal that would fall down between the belts?

A Well, that wasn't my job. It come under transportation. They would clean it up.

Q So your job would only be to blow the coal out?

A Well, no, it wouldn't. He just insisted me come over there and blow it out. If they do that, it mostly would be shut down, they would come up and get us. We working one side, and they put us on the other side to clean up over there sometime.

Court: How often did you do that?

A Often as they come and get us.

Court: How often was that, [T:71] every day, every other day?

A Sometimes practically every other day or every day sometimes.

By Mr. Brahm:

Q Mr. McGlone, how long did you work for the Mechanical Department just before this accident?

A From '76, the twelfth month and the ninth day of '76.

Q How long did you work for Mr. Layne?

A Well, I was working underneath him off and on from '76 on, until the accident. We have different shifts. I would be under him every time since I have been there.

Q Mr. McGlone, have you ever been injured while you worked for the railroad before?

A Yes, I have.

Q How many times, sir?

A I guess about four times, if I am not mistaken, I believe four times.

Q Do you recall an injury that you had in July of 1982?

A Yes, on that same belt.

Q Where was that injury, sir? Was that on the land or over the water?

[T:72]A On land.

Q Was it closer to the water than where you were injured this time?

A It was closer, yes, than where I was at that time.

Mr. Brahm: Can I look at Plaintiff's Exhibit Number Two, Judge? I think it's a photograph.

By Mr. Brahm:

Q I'll show you what has been previously admitted as Plaintiff's Exhibit Number Two, and ask you if you can identify the photograph, first, and if you can show us where you were injured in July of 1982.

Why don't you stand up and point it out to the Judge.

A Right in here on the outside of this dumper, right down in here underneath where part of this is at (indicating).

Court: Put an "X" where you say it was.

(At this time, the witness complied with the request of the Court.)

A Somewhere in here (indicating).

Court: Write down hard on it [T:73] with an "X." Right there (indicating)?

A Yes.

By Mr. Brahm:

Q What were you doing at the time of this injury?

A We was washing the belt, the coal out from underneath the belt with high pressure hose.

Q All right. And was the belts on or were they off?

A No, they was shut down. They was working the other side. They always shut down.

Q Were you ever offered any longshoremen benefits for this injury?

Mr. West: I object to the question and the line of questioning unless there's some authority for an estoppel.

Court: Let me ask you one thing here. Were you injured at that time?

A Yes sir.

Court: Did you receive any compensation for your injuries?

A No sir.

Court: From any source?

A No.

Mr. West: That's the subject of [T:74] my objection. Unless there's some estoppel theory.

Court: I think—

Mr. Brahm: The railroad cannot have it both ways.

Court: I think it certainly can.

Mr. West: We can.

Court: I overrule your objection.

By Mr. Brahm:

Q Mr. McGlone, did you settle that claim with the railroad company?

A Yes.

Mr. West: My objection relates to all this.

Court: Overrule your objection. It is relevant, what type of work he was considered by the railroad and by him.

By Mr. Brahm:

Q Can you—

Mr. West: In 1982?

Court: I understand that.

Mr. Brahm: The act they claim coverage under was enacted in 1972.

Court: I understand.

[T:75] By Mr. Brahm:

Q Can you identify that, sir?

A Yes sir.

Q What is that, sir?

A This was the thing where I signed to settle the claim when I got hurt in '82.

Q What did the Claim Agent tell you, what law did he say it was under?

A FELA.

Mr. Brahm: We'd like to have this admitted as Plaintiff's Exhibit Four.

(At this time, the document was received and marked as Plaintiff's Exhibit Number Four.)

Mr. West: Note our objection.

Court: All right, sir.

By Mr. Brahm:

Q Mr. McGlone, are you familiar with the contract that exists between your labor union and the railway company?

A Yes.

Q Do you know of any provision in that contract that provides for compensation under the Longshoremen Act?

[T:76]A No sir.

Q Now, Mr. McGlone, prior to this injury in 1983, which is the subject matter of this litigation, if you were injured, wherever you were injured, what law or what act did you expect to be covered under?

Mr. West: I object.

Court: I sustain the objection. What he expected is not relevant.

Mr. Brahm: I withdraw the question.

Mr. McGlone—Judge, may I have Plaintiff's Exhibit Number Three, I believe it is. The notice.

(At this time, the exhibited [sic] was handed to Mr. Brahm.)

By Mr. Brahm:

Q Mr. McGlone, in the course of your employment with the railway company, are you required to look at bulletin boards for notices?

A Yes—bulletin notices on the bulletin board, you have to go there, because they put up different jobs, you check that every day.

Q And is this—on the C & O pier facility?

A Yes.

[T:77]Q I ask you if you will look over Plaintiff's Exhibit Number Three and see if you can identify that as being posted in your—

Court: Have you ever seen a notice like that?

A No sir, never have.

By Mr. Brahm:

Q Now, Mr. McGlone, were the belts moving, or were they shut down at the time you were injured?

A They was moving.

Q Would you tell the Judge what you did just before you were injured?

Court: Now, we're getting into the facts of this.

Mr. Brahm: I think it's important, Judge, because of the fact that he—he requested the belts be shut down.

Court: I understand that, but that's not—we got somewhere the FELA stuff, the Longshoremen's and Harborworkers' Act starts, and somewhere, it's maybe here or there, and that's the factual situation I believe I have to determine, but how he actually got injured doesn't make any difference.

The idea was what I think is [T:78] relevant, whether he was loading or not unloading, exactly what he was doing, which he told you he was doing. But—somewhere there has got to be a line where one act stops and the other one starts. And that's what I believe I have to determine here.

By Mr. Brahm:

Q Mr. McGlone, have you ever accepted any benefits, compensation benefits under the Longshoremen Act?

A No sir. I didn't know anything about it, because at the time I was in the hospital, and when I come home out of the hospital I had checks there at the house. And I knew I wasn't supposed to be getting under. He explained it to me, it comes under the maritime. And I knew I wasn't supposed to come under that, and I called you.

Q Did you send those checks back?

A Yes.

Q Are you receiving any benefits right now, sir?

A Yes.

Q From where?

A Railroad Retirement Board.

Q Mr. McGlone, did Mr. Layne tell you at the time of your injury that it was important [T:79] for you to clean

out under the belts while they were running because the barge was being loaded?

A Yes. He insisted that I should clean out from underneath the belt at the time it was running.

Q Have you ever been a member of the International Longshoremen's Association?

A No sir.

Mr. Brahm: That's all the questions I have.

CROSS EXAMINATION

By Mr. West:

Q Mr. McGlone, you referred before to your agreement. That's the agreement between your union and the railroad that you're talking about?

A Yes, the Boilermakers, Oilers.

Q And you said there was nothing in there that said that you would be covered under the Longshoremen's and Harborworkers' Compensation Act?

A No, not as I know of.

Q Is there anything in there that says you won't be covered under the Longshoremen's and Harborworkers' Compensation Act?

[T:80]A Well, the way they explained it to us—

Q What I'm asking, you said—

Mr. Brahm: He's trying to explain it.

Mr. West: This is what somebody told him.

By Mr. West:

Q You read the contract; is there anything in it?

A No, it's not.

Mr. West: That's all I have.

Court: All right. Step outside, sir.

Mr. West: If I might make a point here. I think Mr. Brahm will agree with it. If the Court got the impression we are claiming the man comes under the act but are not paying him compensation, this is pursuant to an agreement between the C & O and your firm. We wouldn't just continue every two weeks sending him a check and having it returned.

Court: Certainly not relevant for this, what we're doing here now.

* * *

**VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF PORTSMOUTH**

AT LAW NO. _____

WILLIAM C. MCGLONE,

Plaintiff,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

SERVE:

Aubrey R. Bowles, III, Esquire
Registered Agent
Chesapeake & Ohio Railway Company
901 Mutual Building
Richmond, Virginia 23219

REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiff, by counsel, pursuant to the Rules of Court, requests that the defendant respond within twenty-eight (28) days after service, at the offices of Moody, Strople, Brahm & Lawrence, Ltd., 201 J. J. Henry Building, County and Court Streets, Portsmouth, Virginia, produce or make available for copying, or furnish the originals or copies of the following, or permit the plaintiff to have copies made at his expense, the following items:

1. Produce ship docking and ship departure reports for pier 14 for February 1, 1983.
2. Produce all documents the defendant intends to rely upon at trial or hearing in this matter.
3. Produce all Release of Claims forms executed by the plaintiff within the last ten (10) years.

4. Produce all Railroad Retirement Sickness Benefits Apportionment forms executed by the plaintiff within the last ten (10) years.

5. Produce all Notices of Compensation used by the defendant within the last ten (10) years at its Newport News yard.

6. Produce the plaintiff's entire personnel file.

7. Produce the plaintiff's entire medical file.

8. Copies of the lists of Railway personnel working at the Newport News Barney yard and Pier 14 on February 1, 1983.

WILLIAM C. MCGLONE

By /s/ Russell N. Brahm, III
Of Counsel

Russell N. Brahm, III
Willard J. Moody
Moody, Strople, Brahm
& Lawrence, Ltd.
Post Office Box 1138
Portsmouth, Virginia 23704-1138

**VIRGINIA: IN THE CIRCUIT COURT FOR THE
CITY OF PORTSMOUTH**

LAW NO. L-83-327

WILLIAM C. MCGLONE,

Plaintiff,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant.

**RESPONSE TO REQUEST FOR
PRODUCTION OF DOCUMENTS**

The defendant herewith responds to the plaintiff's Request For Production Of Documents and says:

1. Produced herewith to the plaintiff.
2. Any or all documents previously or subsequently furnished by way of Answer To Interrogatories by the defendant or in response to this or subsequent Request.
3. Produced herewith to the plaintiff.
4. Produced herewith to the plaintiff.
5. Produced herewith to the plaintiff.
6. Produced herewith to the plaintiff.
7. Produced herewith to the plaintiff.
8. See defendant's Answer to Interrogatory No. 3, previously filed herein.

**THE CHESAPEAKE AND OHIO
RAILWAY COMPANY**

By /s/ Richard Wright West
Of Counsel

JA-111

Richard Wright West, Esquire
WEST, STEIN, WEST & SMITH, P.C.
P. O. Box 257
Newport News, VA 23607
Counsel for Defendant

THE CHESAPEAKE & OHIO RAILWAY COMPANY

SETTLEMENT AND FINAL RELEASE OF ALL CLAIMS

Read Carefully Before Signing

The undersigned acknowledges the receipt of Two Thousand & 00/100 Dollars (\$2,000.00) from THE CHESAPEAKE & OHIO RAILWAY in full settlement and satisfaction of all claims, demands, and causes of action hereinafter mentioned, and in consideration of said payment hereby RELEASES and forever discharges THE CHESAPEAKE & OHIO RAILWAY COMPANY, its agents, servants and employees _____ from all claims, demands, and causes of action which the undersigned has or might have against them or any of them arising out of or in any way connected with personal injuries received at or near Newport News, Virginia, on or about July 9, 1982. This settlement is made upon my representation that I have not received any supplemental sickness benefit payments because of this accident and if I do receive any hereafter because of this accident, I agree to reimburse said Railroad Company the amount so received.

Both the undersigned and the Company do now acknowledge that the injuries which the undersigned sustained may be permanent and progressive; that recovery may be uncertain and indefinite and that injuries, damages and losses may not now be fully known and may be more numerous and more serious than now believed. In making this SETTLEMENT AND FINAL RELEASE the undersigned relies wholly upon his or her own judgment and has not been influenced to any extent whatever by any representation or statement of the claim agent, doctors, or other representatives of the Company. The undersigned admits that no promise or agreement has been made to him or her, and that this RELEASE contains the entire agreement between the parties hereto and that all the

terms of this RELEASE are important parts of this contract and are binding upon all parties.

The word "injuries", where used in this SETTLEMENT AND FINAL RELEASE, include all injuries which are unknown as well as injuries which are known and includes all consequences of such injuries which may hereafter develop as well as consequences now developed. This settlement is intended to be final, the undersigned taking his or her chances that the injuries may prove to be more serious than now believed and the other parties taking their chances that the injuries may prove to be less serious than now believed.

It is further understood and agreed that this is a settlement by compromise of a disputed claim and that the payment made is not to be construed as an admission of liability, all liability being expressly denied.

I have read and understand this release W.C. Mc.

SIGNED and SEALED at N.N.VA., on this 6 day of AUG, 1982

Witnesses Sign Here /s/ William C. McGlone

/s/ W.B. Swain

/s/ F.L. Royall

Newport News, Virginia, August 6, 1982

The Chesapeake and Ohio Railway Company having agreed to pay the sum of xx Two Thousand & 00/100 xx Dollars in settlement of my claim for personal injuries received at or near Newport News, Virginia on or about July 9, 1982, I hereby request said Railway Company to apportion the entire amount to be paid in said settlement to factors other than time lost. It is understood that this request is made and this consent given for the sole purpose of complying with the requirements of the Railroad Retirement Act, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act, and is not to be so construed as to impair or limit the effect of the personal injury settlement above mentioned or of the general release which I am to execute in consideration of said settlement.

This settlement is subject to lien of the Railroad Retirement Board in the amount of No lien.

/s/ William C. McGlone

Railroad Identification No. 2612047

Witnesses: /s/ W.B. Savain

/s/ F.L. Royall

The apportionment above requested is hereby made.

Executed at Richmond, Virginia on this 6th day of August, 1982.

The Chesapeake and Ohio Railway Company

By: /s/ F.R. Royall

Invoice No. I 47392

ACCIDENT/INCIDENT REPORT
THE CHESAPEAKE AND OHIO RAILWAY COMPANY

1. ACCIDENT/INCIDENT NUMBER
INN-0195
2. AUTHORIZATION DATE
7/20/82
3. LAST NAME, FIRST NAME, MIDDLE INITIAL
McGlone, William C.
4. IDENTIFICATION NUMBER
2612047
5. SOCIAL SECURITY NUMBER
226-40-8431
6. ADDRESS - NUMBER AND STREET - CITY AND STATE
- ZIP CODE
732 - 34th St., Newport News, Va. 23607
7. OCCUPATION
Laborer
8. SEX
Male
9. DATE OF BIRTH
8/31/34
10. AUTHORIZING OFFICER
W.C. Gross, Gen. Foreman-Piers
11. RESP. CODE
2024
12. OFFICER'S TELEPHONE
(804) 380-5080

THIS IS FIRST REPORT
FINAL REPORT

13. HISTORY (INCLUDING SPECIFIC LOCATION AND DESCRIPTION OF INCIDENT THAT CAUSED INJURY ONSET OF ILLNESS)

Patient states that he fell on a conveyor belt, sustaining injury to his back and right hip

14. DATE OF INJURY OR ILLNESS
7/9/82

15. FINDINGS ON EXAMINATION (ATTACH RESULTS OF X-RAYS, TESTS, OTHER STUDIES, OPERATING NOTES, DISCHARGE SUMMARIES, ETC.)

Re: William McGlone #5697 July 22, 1982

Mr. McGlone is in the office today and he apparently sustained an injury to his right side on July 9, 1982, when he fell against some equipment at his job, resulting in an injury to the mid-portion of his right thigh and the hip area. X-rays were not performed at the time of the injury. He was seen in the ER and evaluated for these injuries. He is seeking an orthopaedic evaluation for an opinion as to the nature of these injuries.

On examination, he does have signs of an injury that is healing on the lateral aspect of his thigh, this does not appear to be serious, but there is some swelling and soreness around this area. We advised him that this should be treated simply with cleansing the area and allowing it to heal over from the sides. He also, has some soreness over the right iliac crest. X-rays taken indicate no evidence of any fractures, but there is tenderness to palpation. Moist soaks, and moderation of activity are advised as a form of treatment. This basically is the extent of his injuries; the diagnosis is abrasion of the right thigh, and a contusion of the right iliac crest. ADG/msd

16. DIAGNOSIS

See #15 above.

17. TREATMENT GIVEN PRESCRIBED (SPECIFY)

See #15 above.

18. FURTHER TREATMENT INDICATED?
NO
19. MEDICATION GIVEN PRESCRIBED?—
NO
20. PATIENT HOSPITALIZED?
NO
21. PATIENT TREATED BY ANYONE ELSE?—
NO
22. PATIENT DISPOSITION (PATIENT INSTRUCTED AS
FOLLOWS)
ABLE TO RETURN TO DUTY-NO RESTRICTIONS-ON 7/
26/82 DATE
23. ADDITIONAL COMMENTS SPECIFIC RECOMMENDA-
TIONS OF TREATING PHYSICIAN
See #15 above.
24. TREATING PHYSICIAN SIGNATURE
/s/ A. Greene, M.D.
25. DATE
7/26/82
27. TREATING PHYSICIANS NAME (IF DIFFERENT FROM
PAYEE)
Arthur D. Greene, M.D.
28. ADDRESS - NUMBER AND STREET
2019 Cunningham Dr.
29. CITY AND STATE
Hampton, VA 23666

JA-118

| 30. DATE | ITEMIZED SERVICE SUPPLIES | AMOUNT |
|---------------|---------------------------|--------|
| 7/22/82 | initial visit | 40.00 |
| 7/22/82 | x-ray rt pelvis | 35.00 |
| 31. TOTAL FEE | | |
| \$75.00 | | |

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CHESSIE SYSTEM

AUG 2 1982

Casualty Prevention Department
BALTIMORE MARYLAND

ACCIDENT/INCIDENT REPORT

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

1. ACCIDENT/INCIDENT NUMBER
INN-0195
2. AUTHORIZATION DATE
7/13/82
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McGlone, William C.
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226-40-8431
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- ZIP CODE
732 - 34th St., Newport News, Va. 23607
7. OCCUPATION
Laborer
8. SEX
Male
9. DATE OF BIRTH
8/31/34
10. AUTHORIZING OFFICER
W.C. Gross, Gen.Foreman-Piers
11. RESP. CODE
2024
12. OFFICER'S TELEPHONE
(804) 380-5080

THIS IS FIRST REPORT

13. HISTORY (INCLUDING SPECIFIC LOCATION AND DESCRIPTION OF INCIDENT THAT CAUSED INJURY ONSET OF ILLNESS)
Foot slipped while washing under coal loading belt and fell against metal beam hurting rt. thigh.
14. DATE OF INJURY OR ILLNESS
7/9/82
15. FINDINGS ON EXAMINATION (ATTACH RESULTS OF X-RAYS, TESTS OTHER STUDIES OPERATING NOTES DISCHARGE SUMMARIES ETC.)
Healing abrasion and contusion of right thigh. Strain of right lower lumbar muscles.
16. DIAGNOSIS
Abrasion and contusion of thigh & back pain.
17. TREATMENT GIVEN PRESCRIBED (SPECIFY)
Rest, heat, fomax tablets for pain, Soaks & Neosporin Ointment to abrasion.
18. FURTHER TREATMENT INDICATED? - DESCRIBE
YES - as above
19. MEDICATION GIVEN PRESCRIBED? - DESCRIBE
YES - Fomax
20. PATIENT HOSPITALIZED?
NO
21. PATIENT TREATED BY ANYONE ELSE?—
YES - ER at Riverside Hospital
22. PATIENT DISPOSITION (PATIENT INSTRUCTED AS FOLLOWS)
UNABLE TO RETURN TO DUTY - ANTICIPATED LOSS OF TIME 10 DAYS
ADDITIONAL INSTRUCTIONS - FOLLOW UP APPOINTMENT: ABOUT 7/20/82
24. TREATING PHYSICIAN SIGNATURE
/s/ Hugh Givens, Jr. MD

JA-121

25. DATE

7/13/82

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CHESSIE SYSTEM

AUG 2 1982

Casualty Prevention Department
BALTIMORE MARYLAND

JA-122

Invoice No. I 47393

ACCIDENT/INCIDENT REPORT

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

1. ACCIDENT/INCIDENT NUMBER
INN-0195
2. AUTHORIZATION DATE
7/20/82
3. LAST NAME, FIRST NAME, MIDDLE INITIAL
McGlone, William C.
4. IDENTIFICATION NUMBER
2612047
5. SOCIAL SECURITY NUMBER
226-40-8431
6. ADDRESS - NUMBER AND STREET - CITY AND STATE
- ZIP CODE
732 - 34th St., Newport News, Va. 23607
7. OCCUPATION
Laborer
8. SEX
Male
9. DATE OF BIRTH
8/31/34
10. AUTHORIZING OFFICER
W.C. Gross, Gen. Foreman
11. RESP. CODE
2024
12. OFFICER'S TELEPHONE
(804) 380-5080

THIS IS FIRST REPORT

FINAL REPORT

13. HISTORY (INCLUDING SPECIFIC LOCATION AND DESCRIPTION OF INCIDENT THAT CAUSED INJURY ONSET OF ILLNESS)

See 1st report.

14. DATE OF INJURY OR ILLNESS

7/9/82

15. FINDINGS ON EXAMINATION (ATTACH RESULTS OF X-RAYS, TESTS OTHER STUDIES OPERATING NOTES DISCHARGE SUMMARIES ETC.)

Much improved. Laceration on thigh healing. Twinge of pain in right lower back with certain movements.

16. DIAGNOSIS

Contusion of thigh with laceration and low back strain.

17. TREATMENT GIVEN PRESCRIBED (SPECIFY)

Cont. same.

18. FURTHER TREATMENT INDICATED?-DESCRIBE

YES - Rest, Zomax, soak & Neosporin of ointment

19. MEDICATION GIVEN PRESCRIBED?-DESCRIBE

YES - Zomax

20. PATIENT HOSPITALIZED?

NO

21. PATIENT TREATED BY ANYONE ELSE?

YES - ER at Riverside

22. PATIENT DISPOSITION (PATIENT INSTRUCTED AS FOLLOWS)

ABLE TO RETURN TO DUTY-NO RESTRICTIONS-ON 7/26/82 DATE

23. ADDITIONAL COMMENTS SPECIFIC RECOMMENDATIONS OF TREATING PHYSICIAN

To work 7/26/82.

24. TREATING PHYSICIAN SIGNATURE

/s/ Hugh Givens, Jr.

JA-124

25. DATE

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CHESSIE SYSTEM

AUG 2 1982

Casualty Prevention Department
BALTIMORE MARYLAND

Invoice No. I 47309

ACCIDENT/INCIDENT REPORT

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

1. ACCIDENT/INCIDENT NUMBER
INN-0195
2. AUTHORIZATION DATE
7/09/82
3. LAST NAME, FIRST NAME, MIDDLE INITIAL
McGlone, William C.
4. IDENTIFICATION NUMBER
2612047
5. SOCIAL SECURITY NUMBER
226-40-8431
6. ADDRESS - NUMBER AND STREET - CITY AND STATE
- ZIP CODE
732 - 34th St., Newport News, Va. 23607
7. OCCUPATION
Laborer
8. SEX
Male
9. DATE OF BIRTH
8/31/34
10. AUTHORIZING OFFICER
W.C. Gross, Gen.Foreman-Piers
11. RESP. CODE
2024
12. OFFICER'S TELEPHONE
(804) 380-5080
13. HISTORY (INCLUDING SPECIFIC LOCATION AND DESCRIPTION OF INCIDENT THAT CAUSED INJURY ONSET OF ILLNESS)
Pt slipped and fell against some steel.

14. DATE OF INJURY OR ILLNESS
7/9/82
15. FINDINGS ON EXAMINATION (ATTACH RESULTS OF
X-RAYS, TESTS OTHER STUDIES OPERATING NOTES
DISCHARGE SUMMARIES ETC.)
Abrasion of epidesmis - 3cm x 15cm
16. DIAGNOSIS
Abrasion of epidermis
17. TREATMENT GIVEN PRESCRIBED (SPECIFY)
Can not read.
18. FURTHER TREATMENT INDICATED?
NO
19. MEDICATION GIVEN PRESCRIBED?
NO
20. PATIENT HOSPITALIZED?
NO
21. PATIENT TREATED BY ANYONE ELSE?
NO
22. PATIENT DISPOSITION (PATIENT INSTRUCTED AS
FOLLOWS)
ABLE TO RETURN TO DUTY-NO RESTRICTIONS-ON 7/
26/82 DATE
23. ADDITIONAL COMMENTS SPECIFIC RECOMMENDA-
TIONS OF TREATING PHYSICIAN
Can not read.
24. TREATING PHYSICIAN SIGNATURE
/s/ Hugh Givens, Jr. MD
25. DATE
7/9/82

RECEIVED
CHESSIE SYSTEM

JULY 21 1982

Casualty Prevention Department
BALTIMORE MARYLAND

**VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF NORFOLK**

LAW DOCKET NO. L86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

September 19, 1986

Before:

HONORABLE CHARLES R. WATERS, II, JUDGE

* * *

[T:12]HERBERT R. CROWDER, called as a witness by
and on behalf of the Defendant, having been first duly
sworn, was examined and testified as follows:

DIRECT EXAMINATION

JOHN Y. RICHARDSON, JR., appearing for defendant.

By Mr. Richardson:

Q Mr. Crowder, state your name, please.

A Herbert R. Crowder.

Q And where do you reside, Mr. Crowder?

A 505 Bonsack Court, Chesapeake.

The Court: Would you spell your last name?

The Witness: C-r-o-w-d-e-r.

By Mr. Richardson:

Q And where you are employed?

A Norfolk Southern Corporation.

Q Your job?

A Master mechanic.

Q Can you tell the Court briefly your career with the railroad, when you came and the ranks you came up through?

A It [sic] was hired in 1956 in Roanoke, Virginia, as a machinist's helper. I went from machinist's helper to machinist's helper apprentice. I was then furloughed, went to the car department as a labor foreman. From there to Williamson, West Virginia, as a gang foreman. Back to [T:13] Roanoke, Virginia, as gang foreman. Promoted to assistant car foreman in Roanoke. Back to Williamson, West Virginia, as a car foreman, St. Louis, Missouri, as a general foreman, Bellevue, Ohio, as general foreman, Moberly, Missouri, as assistant master mechanic.

Back to Roanoke, Virginia, as a mechanical supervisor in charge of personnel, to Decatur, Illinois, as master mechanic, and now master mechanic in Norfolk.

The Court: It would take a brilliant witness just to remember all that.

By Mr. Richardson:

Q Mr. Crowder, how long have you been at Norfolk?

A I've been at Norfolk since 1979.

Q You have been a master mechanic all that time?

A No, sir. About four and a half years.

Q As master mechanic, what department are you responsible for?

A I have responsibility for the mechanical department which covers the car shop repairing freight cars, locomotive shop servicing and repairing locomotives, and the coal pier operation as far as the mechanical department is concerning being here in Norfolk. I also have facilities at Crewe, Virginia, and at Richmond, Virginia, and have jurisdiction over the areas from Norfolk to but not including Lynchburg.

[T:14]Q All right. Is Mr. Goode, the plaintiff, in your department?

A Yes, sir, he sure is.

Q As well as Mr. Jones and Mr. Bates standing outside?

A Yes, sir, they are.

Q Are you familiar with the term motive power department?

A Yes, sir.

Q Is that the same thing as the mechanical department, would you describe it?

A The motive power department is I won't say a misnomer. It's a term that's been attached locally to almost exclusively the pier department, if you may. It is all mechanical department but that—when we use the terminology here, we are normally talking about the pier group.

Q Okay. Do you know Mr. Goode's title?

A Yes, sir.

Q And what is that?

A He's a machinist.

Q And is he assigned to a particular group within your department?

A Yes, sir, he is.

Q What department is that? Is that the pier department you were describing?

[T:15]A The pier department, yes.

Q Does that also go by the motive power pier department?

A That's correct.

Q How long has he worked in this department, Mr. Crowder?

A I believe, recollection, about 1979 the most recent. He was employed once before, but I don't recall those dates.

Q Okay. Is it your understanding he came back after being employed outside the railroad in 1979?

A Yes. All I know is he was employed before and came back. I wasn't sure what the circumstances were.

Q What did he come back as? If you know. If Mr. Bates knows—

A I'm not sure. I don't know. I'll leave it that way.

Q Other than the machinists that are assigned to the motive power pier department, what other crafts or jobs are assigned to the motive power pier department?

A We have electrical workers, both electricians and helpers. The electrical helpers cover somewhat of a wide scope. They attend the lines for tying ships up and allowing them to leave. They also operate some of the equipment. They work as helpers not only for electricians but for other [T:16] crafts as needed.

We have pipe fitters, we have not as shop craft but we also have laborers that are under our jurisdiction.

Q You have described, I think, what the operators do within the electrical craft; is that correct?

A That's correct.

Q What do the pipe fitters do?

A Prepare and renew lubricating lines, air lines, water lines, oil lines.

Q What do the electricians who are not operators do?

A The electricians, of course, look after all our motors, circuit breakers, power contractors, programmable controllers, electrical switches.

Q Are any trainmen or members of UTU assigned to the motive power pier department?

A No, sir, they are not.

Q Are any trainmen allowed to perform any of these repairs or to operate any of the equipment that's within the motor power pier department?

A No, they are not allowed to repair anything or operate the equipment.

Q Are they allowed on piers?

A Can I rephrase that?

Q Yes, sure.

[T:17]A There is one piece of equipment that the trainman would operate. We have winches where we winch cars if they stall on the dumper. In the same connection, we have what is known as a rabbit. It's a mechanical feature that has an arm on it that will come up underneath the car and grab the car by the axle, if you may, and move it. It's a matter, on the rabbit, of pushing a button. The rope [sic] or the winch is something that can be operated by a brakeman.

Q We may get to that when we are describing the operation.

The matter that we have had marked as Exhibit—Court Exhibit A, have you reviewed that this morning?

A Yes, sir, I have.

Q And are the facts that are related in here essentially correct?

A Essentially, to the best of my knowledge.

Q Any correction you would like to make?

A The only thing that I saw that maybe could be misconstrued was that machinists repair freight cars. That's yes and no. There are times in emergency conditions where they will take a burning torch and trim a car if it's too wide for the dumper. And that's all that's ever has to be done to it. It's ready for service after that. So that could be construed as repaired, but they don't normally, as such, repair car equipment.

[T:18]Q Okay. There was also, I think you discussed with me, whether the 35 number of machinists was correct.

A That's correct. I believe the exact figure was 29 machinists, which did not include gang leaders, and all of those are not assigned to the coal pier operation as such.

Q Okay. Of the 29 machinists, how many are assigned to the coal pier in the Norfolk terminal?

A 16, I believe it was.

Q Okay. So the difference between the 35 number I put in here and the 29 is the gang foremen?

A Gang leaders.

Q Okay. All right.

Mr. Richardson: If this could be admitted into evidence now, I would certainly offer it.

The Court: Well, now—

Mr. Richardson: I am just trying to save having to ask him all those questions. I am going to elaborate on the critical ones. I think that Mr. Wilson, maybe at the conclusion of his testimony if I re-cover it, you may not have any—

The Court: I will admit it into evidence solely as evidence of what this witness would testify to but not for the truth of it.

Mr. Richardson: Okay. That's fine.

EDDIE W. WILSON, appearing for the plaintiff.

Mr. Wilson: All right, sir. To save time, that [T:19] is agreeable. It was my understanding that it was going to be entered simply as a statement of facts with the brief that this witness would corroborate through his testimony. That is the only basis to have its admission at this point.

Mr. Richardson: That's right. To save two hours of time, I am just trying to offer it as opposed to having him recite it on the stand. I think he will recite the areas you are concerned with. If not, I am sure you will bring it out in cross-examination.

Mr. Wilson: The only thing I can say is there are some opinions and conclusions in there which may be Mr. Richardson's as opposed to Mr. Crowder's. I will ask the Court to take note of that when you are reading it.

Mr. Richardson: I'm sure he will.

By Mr. Richardson:

Q .Now, how are machinists—

Mr. Richardson: Excuse me, your Honor. I'll wait until you are ready.

The Court: That's all right. Go ahead.

By Mr. Richardson:

Q Mr. Crowder, how are machinists assigned to the piers as opposed to anywhere else in the Norfolk terminal?

A Machinists, of course, have seniority. There are jobs advertised or railroad talk bids and they bid on their day and their shift predominantly. The third way that [T:20] they bid on jobs is the location. All of the machinists on Norfolk terminal are on the same seniority roster.

If their seniority warrants, they can bid jobs at the coal piers, pier operation, they can bid them for the maintenance gang, which predominantly works at 38th Street car shop, although not necessarily, or they can bid a job at the roundhouse.

Q The roundhouse being?

A Where locomotives are serviced or maintained.

Q Do they move around or generally stay in place as machinists at Norfolk terminal.

A There is some slight movement, but generally speaking you see the same people on about the same jobs.

Q Are the other crafts, the other unions of the railroad, similarly mobile depending on bidding jobs?

A Yes, sir.

Q What do the machinists do in general? If you would define a machinist, how would you do that?

A In the pier operation or in all?

Q Let's say in all first.

A Okay. Well, first of all, I will try to define the difference between electrical and mechanical. Anything that has much electrical to it would go to the electrical craft or the electrician. When I say much, motors don't come under machinists, although they will at times help put them [T:21] in or take them out.

Gears, for instance, almost never come under an electrician, although there are fringe areas that they could.

So anything that is gear driven, anything that has bearings, generally speaking, these are machinist's jobs. Gears, hydraulic systems, pumps. Hydraulic pumps in most cases are attached to an electric motor but the pump part generally would be machinist.

The changing of wheels and pushers, the changing of wheels and barneys. The barney neck, the barney head, the retarders on the dumpers, the hammer mills on the dumpers, the trunnion wheels and equalizers on the dumpers, the—

Q I think we are moving ahead. What do the machinists assigned to the piers do? What equipment do they work on?

A Well, essentially that's—I guess I'm still thinking about the piers. These are the things that the machinists at the piers will do.

Q Okay. Can you distinguish for the Court what that equipment is that the machinists assigned to the piers work on?

A It's—

Q I know you are going to be repeating yourself, but I'm not sure it's clear.

A The equipment I am talking about at the piers, [T:22] the barney, the pushers, the dumpers, are all equipment that we use in our business to dump coal. A pusher will push the car to the barney. The barney will take it, the car, from where the pusher stops up an incline and put it on a dumper. Of course the dumper will roll over. It dumps the car upside down. It has retarders on it that hold it in that position. As it moves onto the dumper, it will stop it where it has to be stopped for the arms to hold the car down.

Q Mr. Crowder, I have shown you some photographs this morning and they are the photographs I handed to the Court earlier which I think we agreed to. Have you looked at those photographs?

A Yes, sir, I have.

Q Are they accurate portrayals of the area out there at Lambert's Point where we are discussing?

A Yes, sir.

Mr. Richardson: If the Court would allow you, could he step down and show you on these photographs the areas we are talking about? There are the originals.

The Court: Sure.

By Mr. Richardson:

Q Maybe this is the one to start with. Could you describe the equipment you were just referring to with relation to this photograph which I believe is Exhibit—

The Court: It doesn't matter which exhibit it [T:23] is.

By Mr. Richardson:

Q What does the photograph show?

A .It shows the dumper. This is the dumper here. This is the incline I was speaking of. And the barney is not shown here, but the barney pushes the cars up onto the dumper, and of course on the dumper are where the retarders are, or at least there are retarders. There are other retarders involved.

As the barney pushes one or two loads on there, it kicks off two empties. They come out through here, and we are looking at the south. This is the north dumper. This will come down and the car will come out on somewhat of a flat area where we have spoke of a rabbit system. It will pick the car up and kick it down or help

motivate it on through some more retarders out to a kick-back. Now, this picture does not show you the kickback or the south, but it is essentially the same as the one from the north. It goes down and rolls up this incline, and while it's up the incline you've got a switch that automatically throws so when it comes back in his direction going to the empty yard it goes on down through another series of retarders.

Q Mr. Crowder, it's understood, I think, that Mr. Goode was hurt while he was repairing a retarder. Can you show the Court where that retarder is?

[T:24]A It would be on this dumper, on the south side dumper.

Q Can you tell the physical location with respect to the track?

A Well, the retarders are within the gauge of the track. Is that what the question is?

Q Yes. How does it act on it? What is its purpose?

A Its purpose is to retard and to hold the freight car, the hopper car, once he gets to the dumper. In other words, the car is revolving as it comes on. Where we want it to stop we will apply the retarder to stop it and then hold it until all motion is stopped.

Q Can you show the Court what equipment the motive power department and machinists particularly have responsibility over the maintenance and repair of in this photograph, or would this photograph probably be better?

A This would give a more general view. This—

Q What does this photograph show?

A I'll speak in railroad east or west, if you may, because geographic is just the opposite. But railroad east—

Q Towards the water?

A Towards the water, going this way, this is the thawing shed.

Q The white building?

[T:25]A The white building. This is the south one and the north one.

Q What does the thaw shed do?

A In the winter months, January and February predominantly we electrically heat these buildings which through infrareds thaws the cold from the skin of the car. It doesn't thaw all the way through.

Q How long is a car in those thaw sheds?

A 20 minutes is a good time. There is no time limit.

Q What equipment in that shed are you responsible for?

A We are in charge of the heaters, their installation, maintenance of the heaters, which comes under the electrical craft, and there are two pushers that operate in each of these buildings which come under both the electrical and machinists.

The Court: You are talking about this pier?

The Witness: Here.

By Mr. Richardson:

Q After the car leaves the thawing shed what does it do?

A Then the barney picks it up, and, if I may, this area here is what we are seeing here. The pusher will push it down to about where this picture stops and then the barney [T:26] will bring it up to the dumper. There is a brakeman that is stationed down in this area or right here that will physically cut the two cars in two or one car in two. The mechanism is the on car to do so.

Q Is he a member of your department?

A No, he is not.

Q All this equipment you're talking about, the barney and pushers, is that equipment within the jurisdiction of your department?

A Yes, sir.

Q Okay.

A Again, the barney will pick it up onto the dumper and all of this is semi-automatic but is activated by a man that works under our jurisdiction, my jurisdiction. They are electrical workers but they are helpers and they are referred to in our terminology as operators.

Q What, after the coal is dumped, happens to it?

A After the car is dumped, it goes down into—

Q I'm talking about the coal itself.

A The coal will go down into hoppers, which, in essence, is in this area, which feeds down, and the hoppers are a funnel type that go down to hopper feeder belts which take the coal and put it on A or A1 belt. There is two series of belts that treat this whole thing. And it takes it from A belt to B belt to C belt.

[T:27]Q What is this white thing in the upper right-hand corner?

A That's the D belt. D and D1 belts. The coal is dumped here, it goes down and comes crossways. It comes over to what we referred to or is referred to as the BC house. It's just a transfer point where the belt dumps from B belt onto C belt.

Q Is this the transfer house pointed out here?

A That's correct.

Q From where does the coal go from there?

A It does on the C or Cl belt out the length or to the loaders. Not necessarily the belts go the length but the coal will come to the loaders.

Q And from the loaders to the ship?

A From C belt it goes to D belt and E and finally F belt and into the ship.

Q All this equipment you have described, the conveyor system, the shiploaders after the coal is dumped is also within your department's jurisdiction?

A Yes, sir.

Q Are they operated by people in your department?

A Yes, sir.

Q Are they maintained and repaired by people in your department?

A The mechanical and electrical facets of it. The [T:28] structural part comes under the engineering department, which is not under my department.

Q When you say the mechanical, are you talking about just the machines out there?

A The wheels, the electrical motors, the trolley systems, idlers underneath the belt, the pulleys that convey the belts.

Q Okay. Has the plat that has been introduced as Exhibit 1 and the landmarks shown on that and the copies of these pictures, do they point to the landmarks you have been describing, the transfer shed, the dumpers?

A Yes.

Mr. Richardson: Your Honor, I don't want to add—

The Court: I can see it.

Mr. Richardson: Okay. I don't think there is any dispute [sic] on those, but I just wanted it clear for the record he attests to what those photographs show.

By Mr. Richardson:

Q Other than the equipment that you have described that being—is it fair to say that the jurisdiction of the motive power pier department shows somewhere around the thaw shed as far as equipment is concerned?

A Yes. That's a fair assumption.

Q How far is the thaw shed, approximately, from the river? How far is the dumpers?

[T:29]A I'm going to say the dumpers are five to six hundred feet and the thaw shed, depending whether you're talking about entrance or exit, six to seven hundred feet. Purely guesstimates now.

Q I understand that. Other than the equipment you have described which your department works on—and I say your department, the motive power pier department—that being the pusher, the barney, the dumpers, the thaw shed, the shiploaders and conveyor belt system—I am sure I have forgotten something—what other equipment does the motive power pier department work on generally, if anything?

A Well, their purpose in being there and their only purpose in being there is to maintain the coal dumping facility. Now, I guess I'm going to answer your question. A good bit of their work is out on these facilities that I've just gone through, the dumper and the loaders and belt system.

Q If you were to assign a percentage of the time they spent working, how much would they work on this equipment.

A 99 percent, I would hope.

Q They are supposed to work on it 99 percent?

A That's right.

Q Do they occasionally have any opportunity to fix rail cars? I notice you took exception to my term repair rail

cars in that factual stipulation. Can you explain what [T:30] they do on occasion?

A The main thing I took exception to was the word "repair." We will have cars that come off the dumper, for instance, that won't roll because the brakes have set up, and the machinist will take a cotter key out, knock a brake pin out, and release the brakes so that it will roll free.

Prior to coming into the thaw shed—not necessarily prior to, sometime it's after, but most of the time prior to coming into the thaw shed we have car inspectors that will signify that a car has a spread side, if you may. The limitation—

Q Too wide?

A That's right. The limitations are greater than will go through the area that it's supposed to, which will require, in some instances, a burning torch, oxygen settling [sic] torch, to trim a portion off. Sometimes this is final; you don't have to do anything else after you trim it. Other times the car is rendered bad order and will go to the car shop.

Q So when to repair cars, to use that term, and I know it's wrong, is to coordinate the car going through the unloading process?

A To facilitate the smooth dumping operation, yes, sir.

Q And that's only done on occasion?

[T:31]A That's right.

Q Do they occasionally rerail cars that were derailed in the area of the dumper?

A In the area of the dumper and the kickbacks, yes.

Q Do they release hand brakes on rail cars.

A We never—they don't. They could, but it's really not an assigned duty to them. They will assist—sometimes

when we have a car derailed it's necessary to tie the hand brake up for safety sake. So then if they tie it up, it would be their responsibility to untie the hand brake.

Q I also asked you earlier when we were meeting about the breaking up of frozen coal. For Your Honor's benefit, the reason I am asking you these questions is these facts are contained in Mr. Wilson's affidavits which he is going to submit to the Court. That's why I'm asking him this terminology. I'm not sure what it is either.

Are you familiar with that term?

A Yes.

Q Do machinists do that?

A Machinists could. It would not be an assigned duty unless they had to make a repair to a hammer mill.

Q What is a hammer mill?

A A hammer mill is a mechanism that we have in the hoppers below the dumper where the coal will come out of a hopper car into a pocket prior to going to the belt. And it [T:32] will—in wintertime after it's frozen it will come out in large chunks, to say the least, and a hammer mill is a mechanical means of breaking the coal up so that it will feed through to the belts and henceforth to the ship.

And if a hammer mill breaks down, then it could become the responsibility of the machinist to have to get some of it away so we can get in there and repair it.

Q So it is really related to the repair of the dumping facility?

A That's correct.

Q All right. Now, Mr. Goode, in his deposition, which I don't know if you had an opportunity to read and which will be submitted to the Court, said that he worked pri-

marily on forklifts and trucks as opposed to the coal operation. Is that true?

A No, I wouldn't—that's—I haven't read his deposition, but the reason I said 99 percent, we have two forklifts at the coal piers, six or eight trucks. But they would work on them, yes. There's no question from time to time they might, but not a predominance, no.

Q Is it generally the people assigned to the piers department generally don't spend their time working on forklifts and trucks, I take it?

A That's right.

Q If there was a piece of equipment down there [T:33] they worked on primarily in the coal loading or unloading process, what piece of equipment would that be? I am talking about machinists now. Would one piece of equipment be worked on more than others?

A Well, I think the dumper gives us, in general, more problems than others because of the many, many mechanical facets of it.

Q Okay. To you, you are familiar with the retarders that this gentleman was working on the day he was injured, are you not?

A Yes, I am.

Q I know you have described briefly earlier what that is. Can you tell us how a retarder works?

A The retarder is on a—let me back up just a little bit to give a thorough picture of them.

The track that comes onto the dumper of course is standard gauge for the railroad. It is secured to a table. For better terms we call it a platen. It's a movable thing. The retarder sits inside the gauge of the rail. As the car comes on and we wish to slow it down and/or to finally stop it, then the retarder activates the operator—the op-

erator activates the retarder which applies pressure into the inside wheel face of the wheel to stop at that location.

Q Is this retarder different than other braking systems used on the railroad?

[T:34]A It's different in general than other retarders that are used for the same purpose because the other retarders will squeeze each wheel from each side.

Q Why is this retarder different than those others?

A Because of the structural limitations that we have to work within and again the fact that it's on a movable table.

* * *

[T:37]Q You noted the difference, I believe, between these retarders and other retarders. Did you explain that to the Court?

A I thought I did but for -

Q Okay.

A The retarders on the dumper which is within the confines of the platen, instead of squeezing both sides of a wheel to retard this movement just applies pressure to the inside portion of a pair of wheels.

Q And that is because of the pier 6 dumper structure?

A The structural limitations and the fact that the platen does move.

Q To dump the car?

A That's right.

* * *

By Mr. Richardson:

[T:38]Q Mr. Crowder, did you—as you testified earlier, you showed the Court where those retarders are located on the dumpers; is that correct?

A Yes, I did.

Q Is this dumper operation something that is solely used here in Norfolk or is it used all through the railroad?

A The pier 6 dumping operation at Norfolk is not the only one in the world by any means. It's the only one of its type in this portion of the country or the United States, to my knowledge, which does—I'm not an authority on that. But we have other dumping operations. We have a pier 5 right beside pier 6 that dumps coal but by another method. We have a coal facility at Sandusky, Ohio, that dumps coal which is similar to the pier 5 operation.

Q Is it always dumped in vessels?

A Yes.

Q Is the retarder operation that you have described—as I understand it, that's the thing that Mr. Goode was repairing on the day he was injured; is that [T:39] correct?

A Yes.

Q Is that essential to this pier 6 dumping operation?

A It's a very integral part of it. If we couldn't stop and hold the car when it got onto the dumper, we would be sitting there all day either trying to pull the cars back or by some means get them back in position. Yes, it is important. If it doesn't work, we don't dump.

Q Does the dumper have to be shut down in order to repair or maintain this retarder?

A Yes, sir, it sure does.

Mr. Richardson: Okay. I believe that's all the questions I have of him, Your Honor. If Mr. Wilson has some.

CROSS-EXAMINATION

By Mr. Wilson:

Q Mr. Crowder, these coal cars that are brought to Lambert's Point, where do they originate?

A Coal fields of Southwest Virginia, West Virginia and Kentucky.

Q Are they loaded at the coal mines to be brought to Lambert's Point?

A That's correct.

* * *

[T:41]Q All right. And what is the purpose of the barney yard?

A The cars are classified and go up into these tracks. We perform the landing, which is entirely another subject, but we will take a car off of track 1 and maybe the next car comes off track 9. Then we have brakemen up here that will cut the car again with the mechanical mechanism the car is equipped with, leave the arrows with them, let them roll down and then we will classify it, if you may again, as they come into these switches.

Q Are the railroad brakemen the same people you called trainmen earlier?

A Yes.

Q Are trainmen people that are assigned both closer to the water and further away from the water than these retarders that you were speaking of on the dumper?

A Yes. A trainman will be stationed on the water end of each of the dumpers when we are in operation. There's also another trainman on the inshore end off the dumpers. There's one at the cutter station.

* * *

[T:43]The Court: Well, they ride it only for the purpose of hitching a ride? Why would they do that?

The Witness: When a car that has been put on the dumper that's misclassified—there are hundreds of classes

of coal—and they have to get it off, or we have a mechanical breakdown that we can't dump that car and have to get rid of it so we can repair it at the facility. So I can't say that it never happens, but's so remote that I can't remember the last time it was done.

By Mr. Wilson:

Q But you do agree that a trainman is customarily working in an area closer to the water than this retarder that you were speaking about; is that correct?

A He's assigned to work closer to the water than the retarders, yes.

Q What is his job?

A That trainman?

Q Yes, sir.

A He ensures that the cars get off the dumper and he classifies cars as they come off the dumper. A for instance, if you may, is we classify cars coming off the dumper between 100-ton and a 70-ton car and different railroad's ownership.

. . .

[T:46] By Mr. Wilson:

Q What does BC stand for?

A From B belt to C belt.

Q It's a belt change house; is that what it is?

A Yes, sir. You don't change belts, so that we are talking the same terms. It's where the coal transfers from one belt to another belt.

Q Okay. If you will, why don't you draw a circle now where the dumper operation is where the coal is dumped from the car at the retarders.

A (The witness complied.)

Q All right. And what are these lines that run between these two red circles?

A That's your B belt. B and 1 belt.

The Court: Underground, aren't they?

The Witness: Partially underground and partially above.

By Mr. Wilson:

Q If you will, why don't you draw an arrow between those two circles for us.

A (The witness complied.)

Q Now show me where the coal goes when it changes from one belt at the BC house onto another belt.

A (The witness complied.)

Q And what is its final destination there?

[T:47]A To another series of belts, but its final destination is shipped [sic] underneath the loader.

Q On the first set of arrows, this is coal en route to the ship and it can't be diverted for any reason?

A It can be diverted.

Q It can. Where?

A We have recircle bins up here in case of a catastrophe.

Q Can't you reverse the belts going into the BC house and load that coal in the railroad cars?

A No, sir.

Q Are you sure of that?

A I'm positive.

Q Is there any way that coal can be diverted from the time it hits the first belt under the dumper as opposed to putting it into a ship? Anyplace on land I am speaking of.

A On land?

Q Yes, sir.

A No.

Q If the other belt doesn't pick it up you don't have any way to divert the coal; is that true?

A No. It just piles up inside the BC house. If that belt were broke down and this one continued to operate.

* * *

REDIRECT EXAMINATION

[T:66] By Mr. Richardson:

Q Mr. Crowder, it wasn't clear on the record. The trainmen, the brakemen that Mr. Wilson asked you about that are in the vicinity of the dumper, they don't operate any of that equipment, do they, other than the rabbit that's on the back track?

A That and the winch. That's the only things that [T:67] they—

Q They don't go out to the piers as the machinists do to work on the shiploaders and those kinds of equipment?

A No, they do not.

Q They don't operate any of that equipment?

A No, they do not.

Q Mr. Goode, since he came back to work in '79, has he been assigned principally at the piers?

A To the best of my knowledge, he's been at the piers or that's where I've known him is at the piers.

Q He was assigned there when he was injured, was he not?

A That's correct.

Q And had been assigned for sometime prior to that; is that right?

A Yes.

Q There was some discussion about where these gentlemen report. Where do machinists such as Mr. Goode report in the morning?

A To the mechanical or the motive power building at the coal piers.

Q Can you show that to the Judge on this plat? I believe it is designated. Is that the motive power building?

A Yes.

Q And in this picture showing the thawing shed, is [T:68] that the two-story big building?

A That's correct.

Q Why is that building located down where it is?

A It was placed there—I don't know when it was built, but it was placed there to facilitate the piers to the coal handling equipment or the dumping equipment.

Q Approximately how far is that from the water?

A 150 feet, approximately.

Q Is it along the same line offset from the water as the dumpers are, approximately? Are they adjacent?

A Well, they are somewhat side by side. The dumper is a little bit further from the water.

Q Okay. Now, Mr. Wethington who Mr. Wilson asked you about, he is assigned to the maintenance gang?

A Yes, sir.

Q He is not assigned to the piers, I take it?

A His bid in job right now is the maintenance gang, yes.

Q And Mr. Goode, as you testified previously, didn't work at the roundhouse or on 38th Street hopper or the maintenance gang work that you have described; is that correct?

A Right. His bid job is for the piers.

. . .

RECROSS EXAMINATION

[T:71] By Mr. Wilson:

Q Do you have knowledge there is a U.S. Steel plant in Alabama that unloads rail cars and coal?

A I have no personal knowledge of that.

Q But you do have knowledge there other facilities that unload coal not related to ships or piers or anything else; isn't that true?

A That's correct.

Mr. Wilson: That is all I have, Your Honor.

Mr. Richardson: Thank you, Mr. Crowder.

Judge, do you have any questions?

The Court: I have no questions.

Mr. Richardson: I am going to get Mr. Bates if that's all right.

DILLARD BATES, called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Richardson:

Q Mr. Bates, you have been sworn in. Give us your name, please.

A Dillard Bates.

Q And where do you live?

[T:72]A 3612 Terry Drive, Norfolk, Virginia.

Q And by whom are you employed?

A Norfolk Southern Corporation.

Q And what is your job?

A General foreman of piers.

Q General foreman of piers?

A Yes, sir.

Q Who is your supervisor, your boss?

A Mr. H. R. Crowder.

Q That is this gentleman right here?

A Yes.

Q Are you also in the department of the motive power, the mechanical department?

A Yes, sir.

Q As general foreman of piers, are you Mr. Goode's boss?

A Yes.

Q Okay. And how long have you known Mr. Goode?

A I've known Mr. Goode since back in 1979 when he came with the railroad or before that.

Q Okay. Did Mr. Goode—are you privy to what Mr. Goode does on a day-to-day basis?

A Yes.

Q And why is that?

A Because I'm general foreman, his supervisor [T:73] answers to me.

Q And do you participate in assignments to gentlemen assigned to the piers department?

A Not directly. Indirectly.

Q Okay. Explain that.

A I have a machinist supervisor that Mr. Goode comes under who reports to me and he makes daily assignments.

Q Okay. But you participate in those decisions?

A Yes.

Q How many machinists do you all have down at the piers department?

A At the piers? I believe right now we have about 19.

Q Okay. And since '78 or '79 when Mr. Goode returned to the railroad, has he generally worked in the piers department?

A Generally, yes. I believe there was on period that he worked in the maintenance gang for a short period.

Q But primarily he's worked at the piers?

A Primarily at the piers, yes.

Q Okay. Did he come on as a line tender helper?

A Yes.

Q What does a line tender helper do?

A They help tie up ships or if they are not tying up ships they can be assigned to help the electricians or the [T:74] machinists or any general help that you need.

Q What equipment is the motive power piers department responsible for?

A They are responsible for the equipment and operation of the piers, the dumpers, pushers, loaders is their main responsibility at the piers.

Q The other classifications, I believe, in your department are pipe fitters, electricians and operators which are also in the electrical craft; is that correct?

A True.

Q What union is the machinists in?

A It's IM—and I'm terrible because I don't know the official designation of the machinist's union.

Q There are no trainmen or UTU people that work in your department—

A No.

Q —do they?

A re they allowed to operate or repair any of the equipment that is in your department?

A No. None of the trainmen, no.

Q What union are the electrical workers in?

A They come under IBEW.

Q Okay. And the pipe fitters?

A It's SCMIA. It's a sheet metal workers union that takes in pipe fitters and sheet metal workers.

[T:75]Q Are the line tenders a member of the IBEW, the electrical workers?

A Yes. The line tenders come under the electrical union, IBEW.

Q All right. Tell me in a general way what machinists such as Mr. Goode assigned to the piers do on a day-to-day basis.

A They are assigned to any mechanical trouble that we would have working the retarders on the dumpers, or they could be assigned to work the pushers or your barney—pushers up the hill; any trouble, breakdown and the repairs of them. Or out on the loaders, any problems we have, mechanical problems with couplings on generators or tack generators or mounting or the alignment of or pulleys. Changing pulleys. Bearings on pulleys. Bearings on wheels and loaders.

Q All the equipment you are describing is equipment used in the dumping of coal from the thaw shed railroad east?

A All used for the sole purpose of dumping coal.

Q Okay. Do they have occasion to deal with rail cars?

A On occasions if we get what we call a bulge side with a broken top coping rail, they will—so that they can get it on the dumper, they will make a burn on it. This is something to burn it so it can get clearance. Get it on the [T:76] dumper. Or if the kickbacks—at times we have what they call tight brakes. They will knock a pin out of the brakes so they will freely roll on through the empty yard.

Q Okay. Now, you are aware that Mr. Goode was injured when he was repairing a retarder?

A Yes, I am.

Q Can you tell the Court what a retarder is?

A A retarder is a mechanism on the dumper that allows the operator to stop the hopper cars on the dumper under the arms at the proper place.

Q Who operates this retarder?

A The operator, dumper operator.

Q Is he in the mechanical craft and also a member of the motive power department?

A Yes.

Q Assigned to the pier?

A Assigned to the pier.

Q Are you aware of retarders used generally throughout the railroad?

A Yes.

Q Do the retarders used on dumper 6 differ from the other type retarders?

A Yes. It differs from most other retarders generally on the railroad, yes.

Q First of all, why does it differ?

[T:77]A Because of the space and the—on the dumper they have what we call a platen. It's movable. Normally retarders in the yards squeeze a wheel from both sides. These retarders only squeeze to the inside of the wheels. Squeeze up against one side of the wheel. And through linkage makes it different the way it applies on the platen retarders.

The Court: Let me ask a question. If the retarder on pier 5 is different than all the other retarders in the world but does the same thing by a different method and it's different from the retarder on pier 6, what significance is that? Why do I care about that?

Mr. Richardson: I am not saying pier 5 and pier 6. I'm talking about pier 6.

The Court: Reverse them. What difference does it make?

Mr. Richardson: Again, Your Honor, I anticipate that Mr. Wilson will argue that these are the same throughout the railroad and therefore this gentleman is repairing equipment that everybody else would repair on the railroad. And I believe—

The Court: This is pier 5 we are talking about.

Mr. Richardson: Pier 6.

The Court: Well, now it's different from the one on pier 5, isn't it?

[T:78]Mr. Richardson: I don't know that.

The Witness: Some difference. Similar and the same but some difference between pier 5 and pier 6.

By Mr. Richardson:

Q Is pier 5's retarder also distinguishable from normal railroad retarders?

A Yes, it is.

Q How is that?

A It retards squeezing on the inside of the wheels.

The Court: But they all do the same thing, don't they?

Mr. Richardson: Stop the car.

The Court: Yes.

Mr. Richardson: Yes, sir.

By Mr. Richardson:

Q Now, I have also shown you the photographs and the plats, have I not?

A Yes.

Q Do the symbols on there show the relevant landmarks down at the pier's area?

A Yes.

Q Where does Mr. Goode report to work?

A He reports to the motive power department at the piers.

Q Where is that building located?

[T:79]A It's located on the waterfront. The railing where we do power work.

Q Is that where your office is?

A My office is in this building, yes.

Q Mr. Bates, on a day-to-day basis, how much time does Mr. Goode and similar persons, machinists, assigned to the motive power piers department work on the dumpers?

A On the dumpers alone?

Q Yes.

A It can vary. A lot of times they can spend the entire day on it. It varies as to how much problem or how much wear you have in your retarders or what you have.

Q Do they spend the majority of the time working on dumpers, shiploaders, conveyor belts, the thawing shed equipment? Is that the primary portion of their time?

Mr. Wilson: Your Honor, I think he's testifying again.

The Court: He was testifying.

Mr. Richardson: I am testifying and I know what he's going to say.

The Witness: 98, 99 percent of the time is spent directly with the coal loading operation.

By Mr. Richardson:

Q Mr. Bates, do these gentlemen spend a lot of time working on forklifts and trucks?

[T:80]A Not a lot of time. We do have two forklifts that we work on, but a very small percentage of the time would be working on any forklifts or trucks.

Q What about fixing these rail cars you talked about earlier?

A No repair of rail cars. Just work to get them to move out. No repairs of rail cars.

Q Okay. Once coal is put on the conveyor system, that being the conveyor belt underneath the dumper, does that coal generally go directly to the vessel without stopping?

A It goes to the vessel, yes, without stopping, to transfer points to load it. It's the only place it can go.

Q It can't be diverted once it's put on that belt?

A It can be diverted to what we call bins out on the loader but it's then directly put back on the belt into the vessel because at times you have to put it in a bin when you reverse your movement of your load on your belts. You can't travel the coal when you put it in the bin and put it back on the belt to the vessel. There's nowhere it can go but to a vessel.

Q You are familiar, again, with the retarders that this gentleman was working on. To work on that retarder, does pier 6 operation have to be shutdown?

A Yes. If it was not retarding the cars properly because you couldn't stop the cars properly on the dumper to [T:81] dump them if they are not operating properly.

Q So to work on the retarders that this gentleman is working on, the operation would have to shut down? The dumping operation?

A Yes. On that one particular side.

Q Okay. If the retarders on the other side were inoperative, that part would have to be shut down also, would it not?

A Yes.

Q It wouldn't affect what went on behind it, would it, the thawing shed operation or the barney or the pusher or the scales?

A It wouldn't affect it other than it would mean you would have cars sitting there and you could not dump.

Q Is this dumper operation unusual for the railroad, this pier 6 dumper operation?

A It's the only operation of its type on the railroad.

The Court: Again, is that something that is referred to in some case law somewhere? I don't see the significance of that. I mean if I'm supposed to, tell me. Is that something that was mentioned in some case law somewhere?

Mr. Richardson: Your Honor, pier 6 dumper is different. Because it's different it requires different [T:82] retarders, it involves everything else. That's just what I am trying to point out to you. You may take it with a grain of salt, but I feel like it just shows that this is a coal unloading operation and that it is different than normal railroad work. If that is significant to you. It may be after reading the case law.

The Court: All right.

By Mr. Richardson:

Q Are you familiar with Robert Jones, a gentleman hurt as a machinist?

A Yes.

Q Where was he hurt?

A In the shop.

Q What was he doing?

A He was repairing a retarder cylinder.

Q Okay. Was he also a machinist?

A Yes, he is.

. . .

Q Mr. Bates, who controls the belts and the idle arm

assembly that goes from the dumpers to the ships? Who works on those?

A Who controls the belts and works on them?

Q Yes, sir.

A The motive power department, my department. The [T:83] operators in the cab control them. Working on them, maintenance of them, comes under my motive power machinist and electric.

Q Do they also work on the machinery out in the shiploaders themselves?

A Yes.

Q What about the trim track that the shiploaders move along?

A Pardon?

Q Is there a track out there that the shiploaders themselves move back and forth on?

A Yes. The loaders will travel the length of the pier, yes.

Q Who works on that trim track?

A The motors and all related equipment, machinists on bearings, mechanical end; electrical people on the electrical end.

* * *

CROSS-EXAMINATION

[T:86] By Mr. Wilson:

Q Mr. Bates, you mentioned the operation of line tenders. They aren't machinists, are they?

A Line tenders are not machinists, no.

Q They aren't in the same union as machinists, are they?

A No.

Q Prior to the unloading of railroad cars, would you agree that machinists participate in the repair of railroad cars?

A Machinists assist in the repair of railroad cars?

Q Yes, sir. Prior to them being unloaded in the south side dumper.

A No, not frequently, no.

Q Do they work on railroad cars?

A Machinists?

Q Yes.

A No, sir.

Q How about the burning? Where does that take [T:87] place?

A It takes place at—most of the time we will do it at the scales. If we can't do it at the scales, we will do it at the barney pier.

Q That is well before the car has been dumped, isn't it?

A Yes. Before the car is dumped, yes.

Q Maybe you didn't understand. The preface to my question was prior to the unloading of the cars on the dumper, don't machinists work on railroad cars?

A They will make burning on what we call bulge cars where the top coping rail is broken at an angle where we cannot put it on the dumper. We will burn it on a taper so it will go to the dumper.

The Court: What does it mean burning?

The Witness: You have an angle, and actually what it is is sometimes I load the car and it will break in the middle. If the point is towards where it sits on the dumper you only have six inches of clearance. It's real close. And if you got a jagged edge sticking out, you can catch and turn what we call a clamp after they pull the cars on the dumper. We burn it in a taper or burn it off so it won't catch on these in this close clearance.

By Mr. Wilson:

Q And after the cars are unloaded on the dumper, isn't it true that machinists are called upon to help in the [T:88] rerailing of derailed railroad cars?

A Yes. If we have a derailment.

Q All right, sir. Don't they work on a device called a pusher, which has been described as a small electric locomotive, prior to the unloading of the cars?

A Yes. The pusher at the barney piers, yes.

Q Don't they work on the repair and maintenance of the barney which is a device used to push the cars up the incline before the dumper?

A Yes, they do.

Q Don't the trainmen activate the barney, railroad trainmen?

A No, sir. The railroad trainmen gives our dumper operators a signal that it is ready to pull and he actually pushes the button to pull the barney.

Q So they participate in the process of signalling which causes the barney to be started?

A Right. They have a green light down there. When he takes the retarders off a green light comes on. Then the barney comes.

Q So machinists do work in and about railroad cars with the movement of railroad cars both before and after they are dumped?

A Yes.

Q We have discussed a place called the BC house.

[T:89]A Yes.

Q And I understand that there are belts that run from the south side dumper to this BC house?

A Yes.

Q Does that belt have a designation?

A The BC House?

Q No. The belt itself. Is it like B belt?

A Yes. B and B1 belt, yes.

Q So B belt goes from the south side dumper to the BC house?

A Under normal operation, yes.

Q And then the coal is dumped on another belt that goes from the BC house to the ships; is that correct?

A That's correct.

Q What is the designation of that belt from the ships to the BC house?

A From the ship to the BC house? Under normal operation, B belt would dump onto C belt. C belt would go down the pier, up through the loader.

Q And that is when they put the coal in the ships, right?

A No, sir. It then dumps onto D belt.

Q So there is another belt involved?

A Which is a belt going across out to your apron. It belts onto E belt.

[T:90]Q Is there a shoot [sic] at the back of the BC house where you can place coal?

A There's a shoot [sic] at the back of the BC house?

Q At the back of the BC house.

A Yes. There is a cleanup place back there where the cleanup belts dump off and also a place back there where if you have a problem with your belt, if we ever do reverse it, it could dump it out on the ground, yes, sir.

Q So you could actually take the coal after it's left B belt and going onto C belt and you can reverse C belt and dump coal back out through the BC house; is that correct?

A That is not done except in special emergency cases. It cannot be just normally reversed.

Q My question is can you do that.

A It could on special conditions.

Q Has it ever been done?

A I have done it when I have come over a belt with a rip.

Q Couldn't you take the coal you dumped over the shoot [sic] and load it in the railroad cars?

A Yes.

Q As a matter of fact, there's a track that runs right down beside the BC house?

A Yes.

Q And there are railroad cars sitting back there [T:91] most of the time, isn't there?

A Right.

Q And they've got coal in them, don't they?

A Yes, sir.

Q And that coal is coal that came out of the railroad cars upon the dumper, isn't it?

A It's cleaned up coal, yes. It came from all over the piers.

Q And retarders are used to stop cars, aren't they?

A Yes.

Q And they are used all over the railroad system to stop cars, aren't they?

A Yes.

Mr. Wilson: That's all the questions I have, Your Honor. Thank you.

REDIRECT EXAMINATION

By Mr. Richardson:

Q Just a couple, Mr. Bates. Mr. Goode was a line tender when he initially came on the department, was he not?

A When he initially came to the piers.

Q Yes. In '79 or thereabout.

A Yes.

Q The gentleman helping Mr. Goode when he was hurt, Mr. Dowdy, he is a line tender, is he not?

[T:92]A Yes.

Q And line tenders are generally the first step to becoming an apprentice and then an electrician or machinist?

A Normally, yes. We pick apprentices from anyone that is interested and qualified.

Q How far from the water is this dumper?

A The dumper?

Q Yes, sir.

A I would take a guess of 500, 550 feet, approximately, from the water.

Q Okay. And how far from the water is the motive power building?

A About 150 feet to 175 feet, approximately.

Q How far apart are those two dumpers and the motive power department?

A The dumpers and the motive power building? It's about 300 feet. Somewhere in there. Just an estimate. Taking extreme one side to the other.

Mr. Richardson: Okay. I think that's all. That you Mr. Bates.

Mr. Wilson: I have no questions, Your Honor.

The Court: Thank you, sir.

* * *

EXHIBIT DESCRIPTION

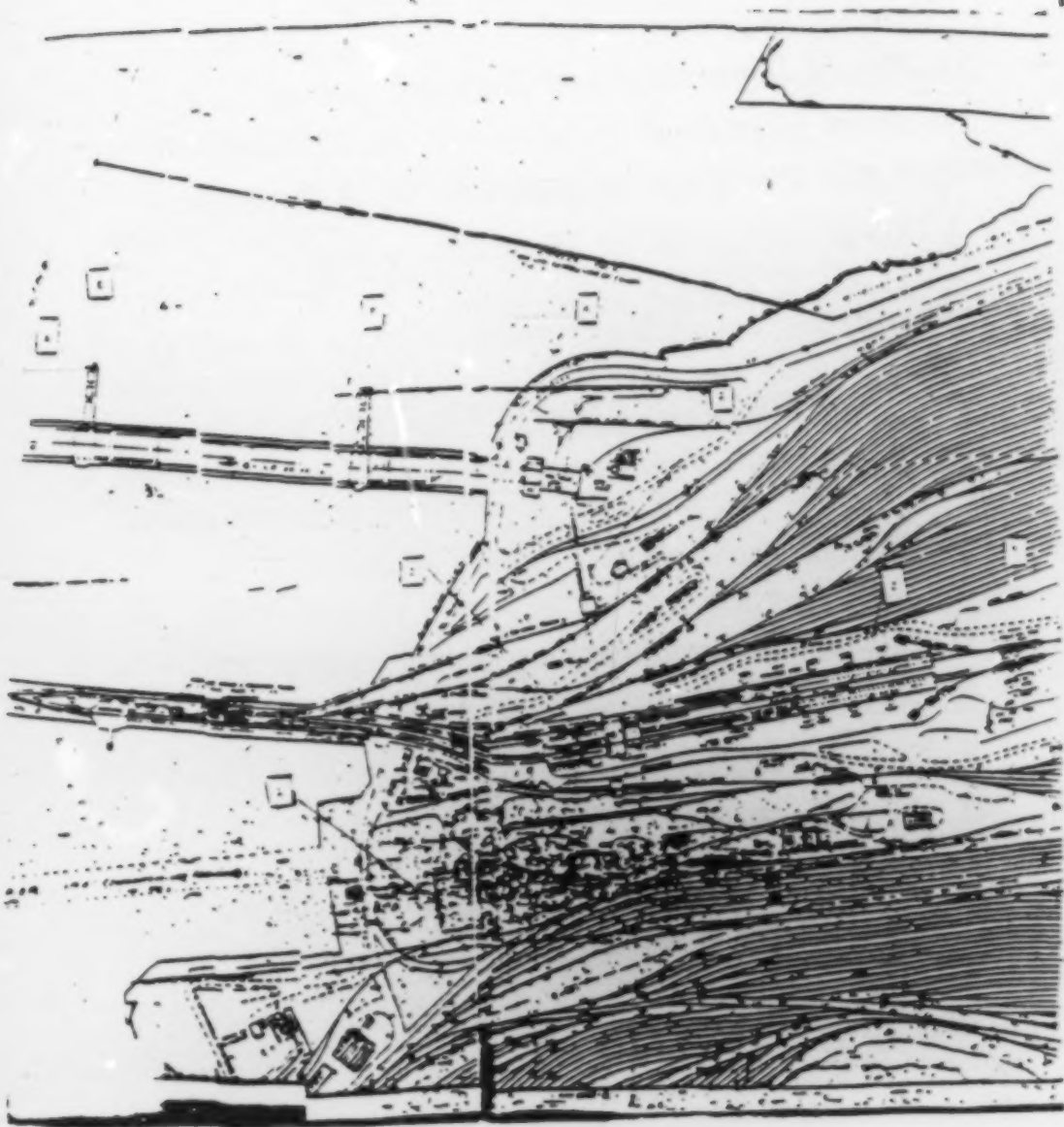
1. Plat of Lamberts' Point Terminal
2. Aerial photograph of Lamberts' Point Terminal
3. Aerial photograph of Lamberts' Point Terminal
4. Aerial photograph of Waterside facilities
5. Aerial photograph of dumpers

LANDMARKS IDENTIFIED ON EXHIBITS

- A. Pier 6
- B. Scales
- C. Thawing Shed
- D. Dumpers
- E. West Shiploader
- F. East. Shiploader
- G. Conveyor System
- H. Transfer Shed
- I. Motive Power Building

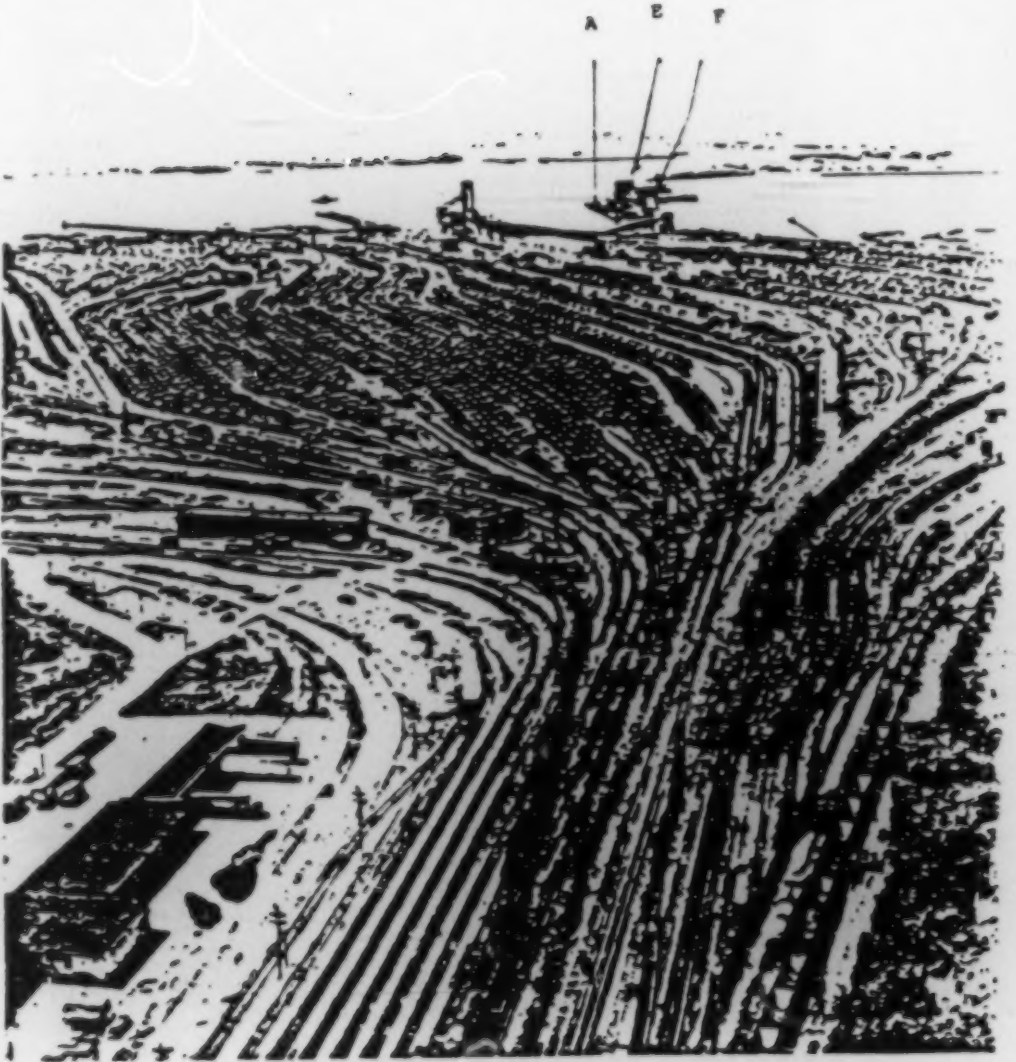
JA-170

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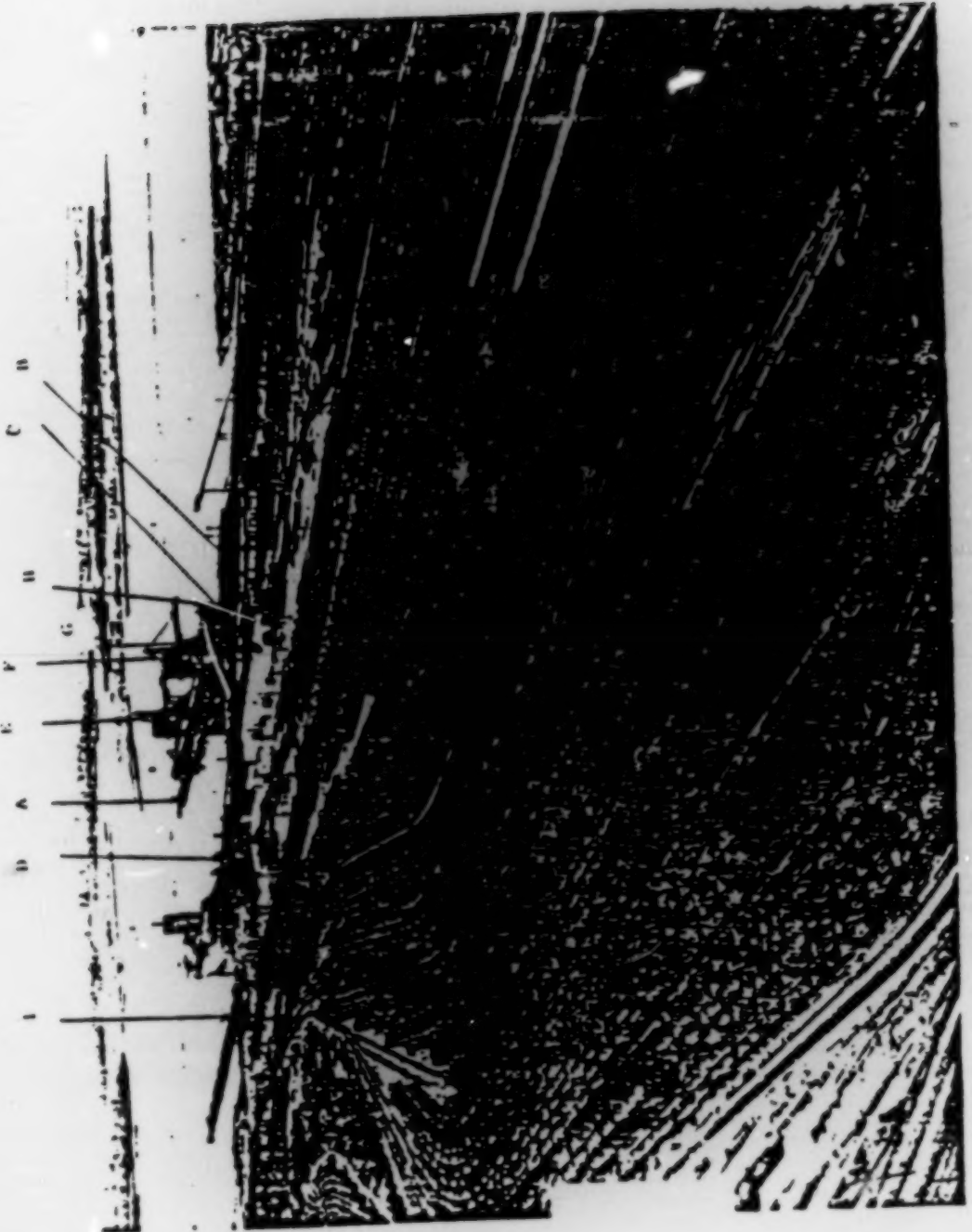
JA-171

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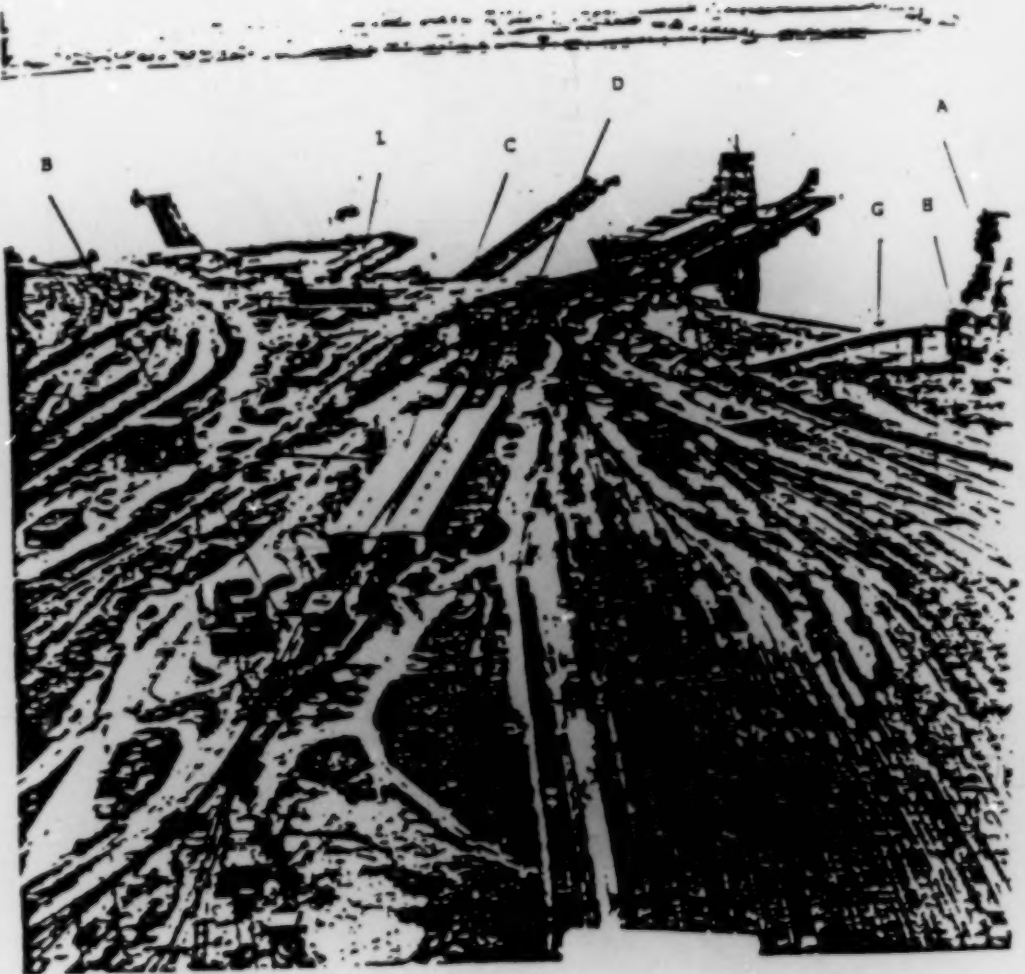
JA-172

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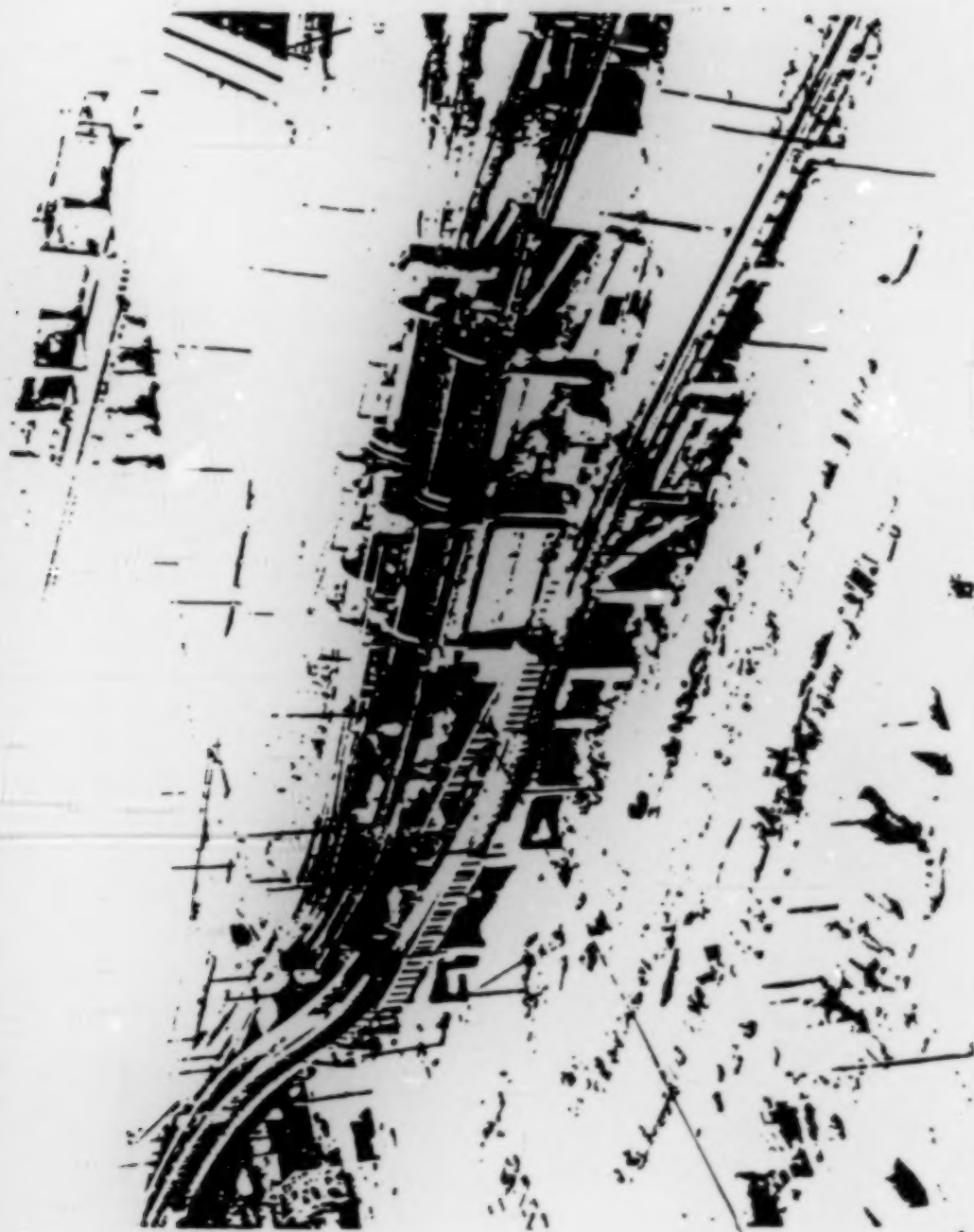
JA-173

EXHIBIT 4



JA-174

EXHIBIT 5



**VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF NORFOLK**

AT LAW NO. L86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

**DEPOSITION UPON ORAL EXAMINATION
OF ROBERT T. GOODE, JR.
TAKEN ON BEHALF OF THE DEFENDANT
June 27, 1986**

[T:3] Robert T. Goode, Jr., called as a witness, having been first duly sworn, was examined and testified as follows:

EXAMINATION

JOHN Y. RICHARDSON, JR., appearing on behalf of Norfolk and Western Railway Company

By Mr. Richardson:

Q Mr. Goode, my name is John Richardson, and I represent the railroad in this matter.

If there are any questions you don't understand, tell me, and I will try to make them [T:4] understandable. If there is anything you want to change during the deposition, tell me to stop, and I will let you change it.

I am trying to find out what your story is and how you got hurt. All I am expecting are frank answers, which I am sure you will give me.

Q Where do you live, Mr. Goode?

A Norfolk.

Q Give me your address.

A 928 Defoe Avenue.

Q And are you married?

A Yes.

Q What does your wife do?

A She is a police officer.

Q With the city of Norfolk?

A Yes.

Q What is her name?

A Nancy.

Q Any children?

A Yes.

Q Names and ages.

A Jennifer, age 12.

Q Okay. Just one?

A Yes.

Q Okay. No other dependents?

[T:5]A No.

Q Okay. Are you a native of Norfolk?

A Yes, sir.

Q And did you go to high school here in Norfolk?

A Yes.

Q Where did you go?

A Maury.

Q When did you—did you graduate?

A Yes.

Q What year?

A Sixty-nine.

Q Did you do anything after graduating as for a education-wise or did you come right to work for the railroad?

A I went to Tidewater Community.

Q For how long?

A About three semesters.

Q Okay. Any particular area of study?

A Police science.

Q Okay. And is that the extent of your post high school education?

A Yes.

Q Okay. What was your first regular job after graduating from Maury?

[T:6]A I was employed with the railroad.

Q What was your seniority date?

A I am not sure.

Q Okay. About what time did you come to work?

A I was working for the railroad while I was in high school. It was probably in '69.

Q Okay. What did you come on as?

A Bridge tender.

Q Okay. How long were you bridge tender?

A And a painter's helper.

Q Both under B & B department?

A Yes.

Q How long were you a bridge tender and painter's helper?

A Approximately three years.

Q And as I understand it, that is under the bridge and building department; is that right?

A Yes, sir.

Q Is that how you classify it?

A Yes, sir.

Q Throughout your years with the railroad, have you always been in that department?

A No.

Q What did you do next after being a bridge [T:7] tender and painter's helper?

A I was drafted in the army.

Q Okay. And about when was that?

A Seventy, July of '70.

Q How long were you in the army?

A Approximately a year and a half.

Q What did you do in the army?

A Infantry.

Q Okay. Did you just exhaust your service or were you discharged for any particular reason?

A Just had an early discharge because the president said it was okay.

Q Okay. And then you came back to work for the railroad?

A Yes.

Q And that was 1972?

A Yes, sir.

Q Okay. What did you come back on as?

A Bridge tender.

Q How long did you stay a bridge tender this time?

A Approximately three months.

Q And then what were you promoted to?

A I resigned and went to work as a police officer.

[T:8]Q Okay. That's after three months in '72. Was that nothing to do with the employment at the railroad? You were just looking for a better job; is that it?

A That's correct.

Q How long were you a police officer?

A Six years and ten months.

Q Just patrolman or—

A Yes.

Q And why did you leave the police department?

A To come back to the railroad.

Q Any particular reason or just tired of being a police officer?

A Tired of being a police officer.

Q When did you come back to work?

A January 19th, 1979.

Q Okay. Did you go back to B & B department?

A No.

Q Tell me what you were employed as that time.

A I went into the motive power department.

Q And have you been in the motive power department from then on?

[T:9]A Yes.

Q To the present day?

A Yes, sir.

Q Tell me a little bit about the motive power department. What is its job primarily?

A What is my job?

Q Let's talk about the department first.

A Basically to run the east end of the railroad.

Q Okay. Is there equipment that the motive power department is particularly responsible for?

A Yes, sir.

Q Tell me about that equipment they are responsible for.

A The thaw sheds, the pushers, the barneys, the dumpers, the conveyer belts.

Q Is it fair to say they are responsible for everything on the railroad east of the thaw sheds.

A Including the thaw shed.

Q Is that where their line sort of stops and comes towards the dumpers?

A No, not really, because we work on equipment at Portlock.

Q What kind of equipment do you work on at Portlock?

[T:10]A Forklifts, railroad engines.

Q Do you do that at Lambert's Point also?

A Yes, sir.

Q Okay. If you had to say what motive power mainly dealt with on a day-to-day basis, would you say the equipment in the coal loading system from the thaw shed to east?

A No, we work on all of the equipment.

Q Okay. And—but I am talking about—do you understand my question?

I am saying, does the motive power department primarily work on the equipment in the coal loading process from the thawing shed to east? Is that your primary responsibility?

A No.

Q Do you spend as much time working on the forklifts as you do the coal loading equipment?

A Yes, sir.

Q Okay. You spend more time working on that stuff like railroad engines and forklifts as you do on the coal loading equipment.

A I would say more time spent on the forklifts and thaw sheds.

Q Okay. More time spent on forklifts than thaw sheds?

[T:11]A No, and thaw sheds.

Q Okay. And barneys and pushers?

What I am getting at is, Mr. Goode, do you spend more time working on thaw sheds and that kind of stuff than you do forklifts and that kind of stuff?

EDDIE W. WILSON, appearing on behalf of Robert T. Goode, Jr.

Mr. Wilson: Excuse me. John, if I could interject this. I am not certain it's clear what you are understanding—what you are asking. If you defined what you consider to be unloading equipment—

Mr. Richardson: I thought I had.

By Mr. Richardson:

Q Assume—

Mr. Wilson: We might not accept your definition, but—

Mr. Richardson: I understand that.

By Mr. Richardson:

Q I will lump everything that goes into the coal dumping and loading process from the thaw sheds east, railroad east as coal equipment. Is that okay? Can you accept that? I am not asking you to agree, but for the purposes of my question, assume that.

Now, percentage-wise, if you can do this, tell me how much time the motive power department spends [T:12] on the coal equipment as opposed to things like forklifts, railroad engines, and that kind of thing.

Mr. Wilson: Before you answer it, I want to object to the form of the question. There has been no foundation laid to show that the coal unloading facilities start at the thaw shed. I think it would be—we are assuming that for the purposes of the question.

Mr. Richardson: Right. I understand that. I am not saying my definition is definitive.

I am trying to get an idea of how much time the motive power department spends on equipment such as the thaw shed, the barneys, the pushers, the dumpers, and what I would classify as coal loading or dumping equipment. Okay.

By Mr. Richardson:

Q Can you answer that question?

A I am not sure.

Q Okay. Who would know that?

A I don't know that either.

Q Who is your supervisor?

A My immediate supervisor is Bobby Jones.

Q And who is his boss?

A Chain of command would be Arnold Meadows.

Q Head of B & B or motive power?

[T:13]A No, assistant general foreman.

Q Okay. Let's keep going. Who is next?

A Dillard Bates or D. T. Bates.

Q What is his title?

A General foreman.

Q All right. Anybody higher?

A Bobby Edwards is assistant master mechanic.

Q Mr. Crowder then?

A Yes.

Mr. Wilson: Is that Herb Crowder we are talking about?

Mr. Richardson: Yes.

By Mr. Richardson:

Q He is the master mechanic, right, Mr. Goode?

A Yes.

Q He is sort of in charge of the motive power department?

A Yes, sir.

Q Okay. Now, since you came back to work with the motive power department in January of 1979, what has been your job? What was your initial job in January of 1979?

[T:14]A Line tender and helper.

Q What does that do? What do they do?

A Basically help the electricians and machinists.

Q Do what?

A Perform repair work.

Q On this kind of equipment we have been talking about earlier?

A On anything.

Q What else did you do?

A Tied up ships on the pier.

Q Okay. Whenever a ship would come in or leave, y'll would tie and untie the ships?

A That's correct.

Q How long were you a line tender and helper?

A Three months.

Q Then what did you become?

A Machinist apprentice.

Q And that essentially means you work on all equipment that you were describing earlier? Is that what the machinist does?

A Yes, sir, works on cars, trucks, forklifts, railroad cars.

Q And how long were you apprentice?

[T:15]A It's a four-year apprenticeship.

Q Have you moved up to a machinist yet?

A Yes, sir.

Q When did that occur?

A I am not sure of the date.

Q All right. How long, a couple of years ago?

A Yes, sir.

Q And you are a machinist today?

A Yes, sir.

Q And I take it a machinist does the same thing a machinist apprentice does essentially?

A Yes.

Q Work on cars, trucks, forklifts, things like that?

A Yes, sir.

Q All right. Just clarify something for me, Mr. Goode. Do you actually go to the car shop and work on cars, rail cars?

A I don't go to the car shop and work on cars.

Q Where do you work on rail cars?

A At the scale office, in the thaw shed, and in the barney pit, and sometimes the dumper.

Q When cars get stuck there or something, is that when you work on them?

[T:16]A Yes, sir. And if something is wrong with the car, we work on it before it goes into the dumper.

Q When you work on a car, it's on the track between the thaw shed and the—whatever the yard is where they go after being dumped?

A Sometimes they are not on the track.

Q What do you mean "sometimes"?

A Sometimes they are derailed, and we have to put them back on the track.

Q Okay. It's generally out of necessity to keep the coal process running, is that fair to say?

A I guess so.

Q Okay. What I am getting at is, you just don't inspect car, and you don't—if you see something wrong that needs to be fixed, you don't stop the coal loading process to work on the cars?

A It would depend on the severity of what needed to be fixed.

Q Okay. Is that something that happens on a regular basis?

A No.

Q Okay. So what do you do most of the time?

A Perform repair work on the equipment for the railroad.

[T:17]Q Okay. All right, Mr. Goode, tell us what happened on the day you got hurt.

A Where do you want me to begin?

Q Let's start with when did you come on that day?

A At 7 a.m.

Q Is that your typical shift, 7 to 3?

A Yes, sir.

Q And when you came on, who do you go to for direction on what to do that particular day?

A Report at the lunchroom at the motive power building.

Q Where is the motive power building?

A Lambert's Point.

* * *

Q All right. Where with respect to the Elizabeth River is the motive power building? Is it down there near the piers or up near the claim department and superintendent's office?

A Approximately 150 yards east of the Elizabeth River.

Q Okay. Near the piers?

A Near them.

Q Okay. You report there. Who tells you what to do, if anybody?

A Bobby Jones.

Q Okay. What did he tell you to do on the day you were hurt?

[T:19]A To go to the south dumper and check and repair the retarders.

Q Okay.

A Retarders are what stops the coal cars.

Q They act like a cushion or something when they unload it?

A Braking system.

Q Is it after they have been unloaded or while they are being unloaded or prior to being dumped?

A Prior.

Q Okay. They are on the dumpers themselves?

A Yes, sir.

Q Tell me a little bit about how the retarders play a role in the dumping process.

A They stop the coal cars in place.

Mr. Wilson: Before you answer that, I object to the form of the question. You are assuming they are involved in the dumping process.

Mr. Richardson: Sure. I understand.

Mr. Wilson: Go ahead and answer it, Bob.

* * *

By Mr. Richardson:

[T:27]Q And how often do you have to replace the sword and pins?

A I don't know. Sometimes you have to replace them, and sometimes you don't.

Q Can you go years without replacing them? Is this something you do every month or every six months or—

A You check them more often, and I am not sure the length of time they last.

Q Okay. You weren't surprised to see they needed to be replaced?

A No sir.

Q Okay. Once you saw that, what did you decide to do?

A Contacted Bobby Jones and told him what the situation was, and he said to replace them.

Q Okay. And is this a big job?

A Yes, sir.

Q Does it require shutting down the dumpers?

A Yes, sir. ,

Q Okay. Was the dumper shut down during [T:28] this time?

A Yes, sir.

Q There wasn't any coal being loaded?

A No, sir.

Q That is when y'all do the maintenance on the dumpers is when it's down like that?

A Yes, sir.

Q Okay. What does the—tell me a little bit about how you go about replacing these things.

A You have to have an acetylene and oxygen torch, and you take the pins, which are actually bolts, out of the linkage, and you heat up the keeper strap that is over top of one of the pins, that is a pin, not a bolt. You bend it out of the way, and you take the pin out, and usually or supposedly that is all that has to be done. You take the pin out and take the sword out.

On this particular day the bushing that the pin goes through was broke, and I had to take the acetylene and oxygen torch and push the bushing block off. Then I had to go back to the shop and get a new bushing block and new pin and come back to the dumper to replace it.

* * *

**VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF NORFOLK**

AT LAW NO. L86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA
CITY OF _____, to-wit:

THIS DAY, before me, the undersigned, a Notary Public in and for the Commonwealth of Virginia, personally appeared Ronel Lee Croft, who, after being duly sworn, made oath that the following statements describe the duties and conditions of employment for a machinist holding seniority on Norfolk Terminal, Norfolk and Western Railway Company, Norfolk, Virginia.

12. A Norfolk Terminal railway machinist may be assigned duties at any geographical point on the Terminal. As an example, machinists work at Portlock Yard (approximately 6 miles from Lamberts Point Yard).

13. All machinists on Norfolk Terminal work from a common seniority list and may change jobs at will, based on their seniority standing on this list.

14. Machinists perform jobs on Norfolk Terminal ranging from the repair and maintenance of pier machinery; to the repair and maintenance of railroad locomotives; to

the repair of railroad cars; to the repair of hydraulic braking systems; to the repair of bridge raising mechanisms.

15. Norfolk Terminal machinists perform these duties at various geographic locations ranging from the Elizabeth River Piers, the 38th Street car shops and the locomotive round house, all at Lamberts Point Yard; to Portlock Yard (approximately 5 miles from Lamberts Port Yard); to Bridge #7 (approximately 7 miles from Lamberts Point Yard); to Crewe, Virginia (approximately 125 miles from Lamberts Point Yard).

16. Machinists assigned to the Motive Power Department at the Pier end of Lamberts Point Yard have job assignments of working on Pier machinery, both over the water and in the shop; also, work assignments involved with railroad cars and railroad equipment, *prior to the unloading of the cars*. Examples of some of these assignments:

1. the repair of railroad cars;
2. the rerailing of derailed railroadcars;
3. the repair and maintenance of pushers (small electric locomotives);
4. the repair and maintenance of the Barney;
5. the repair and maintenance of retarders; and
6. the release of handbrakes on railroad cars.

17. Retarders, such as those in use on the south side dumper at Lamberts Point Yard, are in use throughout the Norfolk and Western Railroad system and are common to all railroads.

18. The purpose and function of such retarders is to stop railroad cars.

19. The function of the retarders on the south side dumper is to stop railroad cars prior to the cars being unloaded.

20. The conveyor belt system used to load coal on ships begins after the unloading of railroad cars at the southside dumper.

21. After a car is unloaded it continues its cycle back to the coal mines to be loaded again, by continuing up a raised track, and is then returned by gravity to an empty car yard.

22. Different crafts of employees work beside the track on which the south side retarder is located. As an example, railroad brakemen work beside this track, and they are geographically closer to the water and piers than is a machinist working on a retarder.

23. Machinists working on the pier end of the yard are worked side by side, over land, with railway maintenance of way employees:

1. rerailling derailed railroad cars;
2. breaking up frozen coal from railroad cars.

24. As a railroad machinist I am required to pay money to the Federal Railroad Retirement Board.

25. As a railroad machinist I am eligible for retirement benefits under the Federal Railroad Retirement system.

26. As a railroad machinist I am eligible to receive Railroad Retirement Board unemployment benefits when furloughed or dismissed from this job.

27. As a railroad machinist I am eligible to receive Railroad Retirement Board sickness benefits when I miss time from work due to illness or a disabling injury at home.

28. My work contract is negotiated under the Federal Railway Labor Act.

29. My rights to hearings, and appeals rights of discipline imposed by the Norfolk and Western Railroad, are rights under the Federal Railway Labor Act.

30. The railroad cars repaired by the machinists are used in interstate commerce.

31. The safety standards for railroad cars stopped by the retarders on the south side, Pier 6, are set by Federal regulations, the Safety Appliance Act.

32. A machinist's work on Norfolk Terminal, with the exception of work on machinery that handles coal after the coal cars are unloaded, is in no way even remotely related to the loading or unloading of ships, nor is this work on piers, nor is this work over water. This work deals with machinery used in the repair of coal cars, the repair of locomotives, vehicles, bridges and track machinery such as retarders.

/s/ Ronel Lee Croft

Sworn and subscribed to before me, in the City of Norfolk, State of Virginia, this 11th day of September, 1986.

/s/ Martha Early

My commission expires: 10-10-88

**VIRGINIA: IN THE CIRCUIT COURT OF THE
CITY OF NORFOLK**

AT LAW NO. L86-335

ROBERT T. GOODE, JR.,

Plaintiff,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Defendant.

AFFIDAVIT

**COMMONWEALTH OF VIRGINIA
CITY OF _____, to-wit:**

THIS DAY, before, the undersigned, a Notary Public in and for the Commonwealth of Virginia, personally appeared Raymond D. Wethington, who, after being duly sworn, made oath that the following statements describe the duties and conditions of employment for a machinist holding seniority on Norfolk Terminal, Norfolk and Western Railway Company, Norfolk, Virginia.

1. A Norfolk Terminal railway machinist may be assigned duties at any geographical point on the Terminal. As an example, machinists work at Portlock Yard (approximately 6 miles from Lamberts Point Yard.).

2. All machinists on Norfolk Terminal work from a common seniority list and may change jobs at will, based on their seniority standing on this list.

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pair of railroad cars; to the repair of hydraulic braking systems; to the repair of bridge raising mechanisms.

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5. Machinists assigned to the Motive Power Department at the Pier end of Lamberts Point Yard have job assignments of working on Pier machinery, both over the water and in the shop; also, work assignments involved with railroad cars and railroad equipment, *prior to the unloading of the cars*. Examples of some of these assignments:

the repair of railroad cars;

the rerailing of derailed railroad cars; the repair and maintenance of pushers (small electric locomotives);

the repair and maintenance of the Barney;

the repair and maintenance of retarders; and

the release of handbrakes on railroad cars.

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8. The function of the retarders on the south side dumper is to stop railroad cars prior to the cars being unloaded.

9. The conveyor belt system used to load coal on ships begins after the unloading of railroad cars at the southside dumper.

10. After a car is unloaded it continues its cycle back to the coal mines to be loaded again, by continuing up a raised track, and is then returned by gravity to an empty car yard.

11. Different crafts of employees work beside the track on which the south side retarder is located. As an example, railroad brakemen work beside this track, and they are geographically closer to the water and piers than is a machinist working on a retarder.

12. Machinists working on the pier end of the yard are worked side by side, over land, with railway maintenance of way employees:

rerailing derailed railroad cars; breaking up frozen coal from railroad cars.

13. As a railroad machinist I am required to pay money to the Federal Railroad Retirement Board.

14. As a railroad machinist I am eligible for retirement benefits under the Federal Railroad Retirement system.

15. As a railroad machinist I am eligible to receive Railroad Retirement Board unemployment benefits when furloughed or dismissed from this job.

16. As a railroad machinist I am eligible to receive Railroad Retirement Board sickness benefits when I miss time from work due to illness or a disabling injury at home.

17. My work contract is negotiated under the Federal Railway Labor Act.

18. My rights to hearings, and appeals rights of discipline imposed by the Norfolk and Western Railroad, are rights under the Federal Railway Labor Act.

19. The railroad cars repaired by the machinists are used in interstate commerce.

20. The safety standards for railroad cars stopped by the retarders on the south side, Pier 6, are set by Federal regulations, the Safety Appliance Act.

21. A machinist's work on Norfolk Terminal, with the exception of work on machinery that handles coal after the coal cars are unloaded, is in no way even remotely related to the loading or unloading of ships, nor is this work on piers, nor is this work over water. This work deals with machinery used in the repair of coal cars, the repair of locomotives, vehicles, bridges and track machinery such as retarders.

In addition to the above, I attest that as local Chairman (Labor Representative) representing machinists on Norfolk Terminal, the following:

I progress discipline appeals to my General Chairman through the Federal Railway Act.

All benefits such as unemployment and sickness benefits are payable through the Federal Railway Retirement Board.

All machinists on Norfolk Terminal that I represent are treated as railway employees, *except* when one is injured at the east end of Lamberts Point Yard (the River End).

All machinists, in all parts of the Terminal, work under work rules set by the Railroad for all railroad employees. Also, they all work under safety rules set by the Railroad for all railroad employees on all parts of the Railroad system.

/s/ Raymond D. Wethington

Sworn and subscribed to before me, in the City of Norfolk, State of Virginia, this 3rd day of September, 1986.

/s/ Martha Early

My commission expires: 10-10-88

6
No. 88-127

Supreme Court, U.S.
FILED

APR 21 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,
v.

ROBERT T. GOODE, JR.,
Respondent.

BRIEF ON THE MERITS OF PETITIONER
NORFOLK AND WESTERN RAILWAY COMPANY
ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

- I. Whether a pier machinist who repairs and maintains coal loading machinery at a maritime terminal has the status of a maritime employee under the Longshore and Harbor Workers' Compensation Act?
- II. Whether a state court's adherence to its own definition of LHWCA status, contrary to uniform federal precedent, effectuates the intent of Congress to create a simple, uniform standard of coverage?

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA**

Petitioner, Norfolk and Western Railway Company,¹ respectfully prays that this Court reverse the judgment of the Supreme Court of Virginia.

REFERENCE TO OPINIONS BELOW

The order of the Supreme Court of Virginia, unreported, is reprinted in the joint appendix at

¹ Pursuant to Rule 28.1 Petitioner states that the prior listing of corporate affiliates in its Petition for Writ of *Certiorari* is currently accurate.

JA: 46.² The letter opinion of Judge Waters, Circuit Court of the City of Norfolk, in the subject case is reprinted at JA: 34.

JURISDICTION

The order of the Supreme Court of Virginia was entered on April 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). On February 21, 1989 this Court granted the Petition for a Writ of *Certiorari*. 109 S. Ct. 1116.

STATUTORY PROVISIONS

This case requires interpretation of certain provisions of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 902(3) and 905(a). The text of these subsections is reprinted at JA: 47-49. This case also involves the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, the relevant portion of which is reprinted at JA: 49.

STATEMENT OF THE CASE

I. Factual Summary

On the Elizabeth River in Norfolk, Virginia the Norfolk and Western Railway Company operates a coal loading terminal ("Lambert's Point"). The pri-

² The court issued no separate opinion, relying instead on its March, 1988 opinion in the consolidated appeals of *Schwalb v. Chesapeake & O. Ry.* and *McGlone v. Chesapeake & O. Ry.*, 235 Va. 27, 365 S.E.2d 742 (1988), reprinted at JA: 20. A Petition for a Writ of *Certiorari* in these consolidated cases was granted by this Court on February 21, 1989. 109 S. Ct. 1116 (No. 87-1979).

mary function of Lambert's Point is the export of coal, coke and general merchandise by vessels plying the navigable waters of this country and the world.³ Coal arrives at Lambert's Point in railroad hopper cars, which are classified prior to loading in an area of the terminal called the "Barney Yard" or "hump yard"⁴ for transfer to a particular vessel at a pre-scheduled loading time. Loading begins⁵ when the coal car is released by brakemen in the Barney Yard to begin its roll to the pier. Continuing its passage toward the pier, the car is moved by a "pusher" through a thawing shed and halted over an area called the "Barney pit." Brakemen, located in this area, position the car and release the car from other cars in the pit in order to allow the car to go up to the dumper. A machine called a "Barney mule" pushes each car up to the dumpers, which are located at the land end of the pier. Positioned by a retarder⁶ and embraced by the dumper's mechanical arms, the coal car is tipped upside down, allowing the cargo to fall onto conveyor belts to be transported without interruption

³ Exhibits introduced below, including a plat and photographs of the Lambert's Point operation labeled to show certain relevant landmarks, are reproduced at JA: 169-174.

⁴ This latter nickname refers to the slope of the yard and track towards the piers, which allows for the manual, non-mechanical movement of loaded rail cars toward the dumpers.

⁵ The lower court concluded this based on the evidence below and to this time respondent has not disputed this. [JA: 35]

⁶ The retarder is a mechanical device that stops the loaded coal car at the correct position on the dumper to permit the car to be held in place while being rotated 180°. The retarders located on the dumpers are structurally unique to the pier operation and are critical to the loading process. [JA: 145]

to the shiploaders, from which the coal drops into the hold of the waiting ship.

Pier 6⁷ projects into the river due west; it is 1600 feet long and 88 feet wide. Located on the pier are two shiploaders that receive coal by way of the conveyor system running from the dumpers. The dumpers are located approximately 500 feet from a conveyor belt transfer building ["B-C" or Transfer Building], located at the land end of the pier. Barring mechanical problems, the coal moves continuously from the Barney Yard into the ship within a matter of minutes by means of the loading machines and gravity. Within 30 minutes after loading is completed, the vessel is expected to be away from the pier and on its journey.

Beginning in 1979, respondent was assigned to the Lambert's Point Motive Power-Piers department, which consists of machinists, electricians, operators (of dumpers, loaders, etc.) and line tender/helpers. Only Motive Power-Piers personnel operate and repair the ship-loading equipment. With the exception of deck foremen and clerical personnel, the only N&W workers allowed on the piers or ships are Motive Power-Piers personnel. This department is headquartered in a masonry building at the piers, located 225 feet east of the water near Pier 5 and 850 feet due south of Pier 6. Machinists, electricians, operators and line tender/helpers working from this building oper-

⁷ There are two coal loading piers at Lambert's Point. Pier 5 is the older structure and is used infrequently at this time. Pier 6 was the structure being used at the time of the subject incident. Referring to the plat and photographs in the appendix, Pier 5 is the southern structure, Pier 6 the northern one.

ate, maintain and repair all the Lambert's Point loading equipment. [JA: 130]

Respondent's first duties as an employee at Lambert's Point included line tending (tying up ships at the pier) and helping the machinists.⁸ By the time of his accident in 1985, respondent had been promoted to pier machinist. [JA: 185] According to respondent's supervisors, pier machinists devote over 95 percent of their work time repairing and maintaining the equipment directly involved in loading coal: the dumpers, the shiploaders out on the pier, and the conveyor belt system between the two. [JA: 141, 156, 159]

On the day of his accident, respondent was assigned to inspect, and repair if necessary, the retarders on the Pier 6 south dumper.⁹ A line tender/helper was assigned to assist him. Upon inspection of the retarders respondent discovered excessive wear in a portion of the linkage, requiring the removal and replacement of parts attached to an air cylinder. The loading process was necessarily halted during the several hours respondent was repairing the retarder linkage. [JA: 160] Respondent injured his hand as he was reattaching an air cylinder to the linkage on the retarder. Respondent alleged that he was "hurried" by his supervisor to complete the task in order to allow the loading to resume.

⁸ His job was "line tender/helper." The "helper" label indicates a pier electrician or pier machinist apprentice. [JA: 154]

⁹ See *supra* note 6 and accompanying text (describing function of retarder).

II. Procedural History

Respondent brought an action in the Circuit Court of the City of Norfolk, Virginia, seeking damages under the FELA. Petitioner moved to dismiss the FELA action for lack of jurisdiction, contending that the LHWCA provided plaintiff's sole and exclusive remedy. 33 U.S.C. § 905(a). After an evidentiary hearing, the trial court sustained the petitioner's motion and dismissed the FELA action. Acknowledging that the duty of lower state courts "is not to make law but to interpret and follow the law as set forth by courts of higher dignity," Judge Waters found that respondent Goode was a maritime employee "involved in the essential elements of loading and unloading" as that phrase has been employed in numerous federal decisions applying the LHWCA status test. [JA: 37] Judge Waters addressed the conflict between the controlling federal decision, *Price v. Norfolk & Western Railway*, 618 F.2d 1059 (4th Cir. 1980), and an earlier Virginia Supreme Court decision, *White v. Norfolk & Western Railway*, 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977). Expressing the belief that Goode would be found a maritime employee even under the narrower *White* analysis,¹⁰ Judge Waters acknowledged nevertheless that "this case does involve a federal question, the federal authorities are therefore the more persuasive, and to the extent that *White* differs from significant federal decisions, the *White* court, in my opinion must yield." See Judge

¹⁰ The Supreme Court of Virginia apparently did not consider this in entering its Order summarily reversing and remanding the case on the basis of its earlier decision. [JA: 46]

Waters' opinion at JA: 37-38.¹¹ The sole issue considered by the Supreme Court of Virginia on appeal was whether Goode was a statutory employee as defined by the LHWCA. Persisting in its adherence to the narrow standard established in its *White* decision, the Supreme Court of Virginia reversed and annulled the judgment of the Norfolk Circuit Court and remanded the case for trial on the merits as an FELA claim. The court issued no explanatory opinion to support its decree, merely referring instead to its opinion issued the previous month in *Schwalb v. Chesapeake & Ohio Railway*, and *McGlone v. Chesapeake & Ohio Railway*, 235 Va. 27, 365 S.E.2d 742 (1988).

SUMMARY OF THE ARGUMENT

Congress enacted the LHWCA in 1927 to provide federal compensation for injured employees working on navigable waters who were otherwise ineligible for state compensation awards. The disparities in coverage perpetuated by the 1927 scheme along with the advent of containerized cargo loading technology prompted Congress to amend the Act in 1972 and again in 1984. The 1972 Amendments significantly broadened the scope of LHWCA coverage by ex-

¹¹ Newport News Circuit Court Judge Smith, in *Schwalb v. Chesapeake & O. Ry.*, No. 8827 (Aug. 8, 1984) and Portsmouth Circuit Court Chief Judge Schlitz, in *McGlone v. Chesapeake & O. Ry.*, No. L84-327 (May 29, 1985) also chose to follow *Price* and the uniform federal authorities extending LHWCA coverage to pier employees, with Judge Schlitz noting that "*White* stands alone in contrast to the federal decisions . . . which have declined to follow *White* and have disagreed with its results." See Opinion of Judge Smith and Opinion of Chief Judge Schlitz. [JA: 28, 30] These rulings were also reversed by the Virginia Supreme Court on appeal. See *supra* note 2 and accompanying text.

panding the definition of the covered situs in 33 U.S.C. § 902(4) to include piers, terminals, and other areas customarily used for cargo loading; and by affirmatively describing the class of covered maritime employees, defined in 33 U.S.C. § 902(3), to include, for example, harbor workers and other persons "engaged in longshoring operations."¹² See *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 261-264 (1977).

There are four inquiries which must be made in order to determine jurisdiction under the LHWCA. The first is whether the employer comes within the Act.

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 902(4).¹³

¹² Further amendment in 1984 refined the "maritime employee" definition in response to some administrative and judicial uncertainty about the intended scope of the act. Congress, however, left undisturbed the 1972 coverage language applicable to this case. See *infra* pp. 17-19 (discussing inference that legislative re-enactment implicitly adopts prior judicial and administrative interpretations). The 1984 version of § 902(3) appears at JA: 47; the prior version appears at JA: 48.

¹³ Petitioner's status as maritime employer has never been questioned. See, e.g., *Price v. Norfolk & W. Ry.*, 618 F.2d 1059 (4th Cir. 1980).

The second inquiry, which is the subject of this appeal, is the "status" test. The employee must be engaged in "maritime employment" as defined by the Act to effect LHWCA jurisdiction.

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship-builder, and shipbreaker. . . .

33 U.S.C. § 902(3).

The third inquiry is related to the status test. To be compensable under the Act the injury must be one "arising out of and in the course of employment." 33 U.S.C. § 902(2).¹⁴

The final inquiry is the issue of maritime "situs", defined as a location which is

upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a).¹⁵

¹⁴ To make a *prima facie* case under the FELA the claimant must plead that injury arose out of or in the course of employment.

¹⁵ The situs requirement was found to be satisfied by the trial court. [JA: 38-39]. The respondent never raised it as an issue in the appeal to the Supreme Court of Virginia nor was this issue raised in Goode's brief in opposition to the petition. The *Schwalb-McGlone* opinion did not address the situs requirement nor did

This Court has prescribed judicial standards, consistent with the legislative intent of the 1972 amendments, for determining whether a terminal worker is engaged in maritime employment (the so-called "status" test) for purposes of the LHWCA. For more than a decade, the lower federal courts and the Benefits Review Board, the administrative body that oversees LHWCA claims, have contributed additional insightful analyses while applying the status test in a variety of factual settings. It is too late in the development of the LHWCA status test for the Supreme Court of Virginia to have misapprehended the principles approved by this Court. By denying LHWCA status to respondent Goode, who was clearly a harbor worker engaged in an integral and essential part of the coal loading sequence, the Virginia Supreme Court has obviously repudiated controlling

the Order reversing this case. In *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979), this Court acknowledged the "broad geographic coverage" of the Act and the concern with occupation more than location. 444 U.S. at 78. The federal courts have found the requisite situs far more landward than in the present case. See, e.g., *Newport News Shipbuilding & Drydock v. Graham*, 573 F.2d 167 (4th Cir.) (submarine shop located 1200 feet from water and foundry 3000 feet from water), *cert. denied*, 439 U.S. 979 (1978); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978) (2600 feet from water); *Stockman v. John T. Clark & Son*, 539 F.2d 264 (1st Cir. 1976) (terminal two miles by road from vessel berths), *cert. denied*, 433 U.S. 908 (1977). The accident site's relationship to the water and piers as shown by the photos and plat cannot be ignored. "One picture may be clearer than a thousand words." *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 516 n.20 (5th Cir. 1980) (recognizing importance of aerial photos in determining situs), *cert. denied*, 452 U.S. 905 (1981). By necessary implication the Fourth Circuit conceded that the subject area was a covered situs in *Conti v. Norfolk & W. Ry.*, 566 F.2d 890 (4th Cir. 1977).

federal precedent. This unsanctioned autonomy clearly imperils the advancement of the simple, uniform standard of coverage envisioned by Congress and subjects all pierside workers, not only railroad employees, to the uncertainties of pursuing various and conflicting remedies for recovery.

ARGUMENT

I. Goode Is A Maritime Employee

Determination of a worker's status as a maritime employee within the terms of the LHWCA is controlled by principles established in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), as applied by the federal courts following *Caputo's* guidance.

We are directed by *Northeast Marine Terminal* to give effect to the remedial purpose of the Act by adopting a broad construction of the status requirement. . . .

Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 140 (9th Cir. 1978). In *Caputo*, the Court found that Blundo, who monitored the stripping of cargo from unloaded containers, was engaged in maritime employment because his job was "an integral part of the unloading process." 432 U.S. at 271. By finding coverage for Blundo, who was performing essentially clerical duties at a shoreside loading facility, the Court emphasized that the critical question in determining LHWCA status is the purpose of the work, not the type of work. The *Caputo* Court also acknowledged that the expansiveness of the 1972 amendments re-

quires a correspondingly expansive reading of the Act by the judiciary. *Id.* at 268.¹⁶

The Court reaffirmed this approach to the LHWCA status test in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979). Again focusing on the nature of a worker's general job responsibility and its relation to the ship-loading process, the Court in *Pfeiffer* ruled that two pier workers were maritime employees because they were "engaged in intermediate steps of moving cargo between ship and land transportation." *Id.* at 83.¹⁷ The *Pfeiffer* Court stressed that extending LHWCA coverage to workers involved in any portion of the cargo moving process would best effectuate the congressional goal of "a simple, uniform standard of coverage." *Id.* *Caputo* and *Pfeiffer* are credited with having created a "functional relationship" test for LHWCA status: if a job is functionally related to the movement of maritime cargo, it is maritime employment for the purpose of LHWCA coverage.

Following these authorities, the Court of Appeals for the Fourth Circuit found a railroad employee whose responsibilities included maintaining and repairing equipment and structures used in loading and unloading vessels to be engaged in maritime employ-

¹⁶ More recently, in *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297 (1983), the Court has emphasized that the Act is to be "liberally construed" and has reaffirmed that Congress intended the amended Act to "extend" coverage and protect "additional" workers. 459 U.S. at 315-16 (quoting S. Rep. No. 92-1125 at 1 (1972)).

¹⁷ *Cf. Conti v. Norfolk & W. Ry.*, 566 F.2d 890 (4th Cir. 1977) (construing *Caputo* not to cover worker not integral part of unloading process unless job is of traditional maritime nature).

ment within the terms of the LHWCA.¹⁸ This case is *Price v. Norfolk & Western Railway*, 618 F.2d 1059 (4th Cir. 1980), in which the court found that the employee, who was injured while painting a tower supporting the conveyor belt system used to transport grain to the holds of nearby vessels, was allowed to seek his remedy only under the LHWCA. To reach the conclusion that this worker was a maritime employee, the court reasoned that:

- (1) the equipment being maintained by the claimant was essential to the loading and unloading of vessels at the port; and
- (2) the maintenance and repair of longshoring machinery and equipment is as essential to the movement of maritime cargo as the actual loading and unloading of ships.

Id. at 1061. The *Price* court, 618 F.2d at 1062, "simply disagree[d] with" *White v. Norfolk & Western Railway*, 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977), finding the reasoning in a Ben-

¹⁸ Although railroad workers generally are allowed to seek damages for work-related injuries under the FELA, it is well settled that railroad company employees may be compensated only under the LHWCA if they are injured while engaged in maritime employment. See *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334 (1953); *Nogueira v. New York, N.H. & H.R.R.*, 281 U.S. 128 (1930). See also *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980); *Freeman v. Norfolk & W. Ry.*, 596 F.2d 1205 (4th Cir. 1979). Congress has never amended either act to permit choice of coverage, or to exempt railroad employees from the LHWCA, despite over 50 years of case law construing the LHWCA to provide exclusive coverage for maritime railroad employees.

efits Review Board decision to be a better statement of the law:

Merely because a waterfront mechanic is not directly involved in the actual loading or unloading of cargo does not remove him from the coverage of the amended Act. *The maintenance and repair of longshoring machinery and equipment is essential to the movement of maritime cargo* and, thus, such an employee's duties are included in the broad concept of maritime employment.

Bradshaw v. McCarthy, 3 BEN. REV. BD. SERV. (MB) 195, 198 (Jan. 26, 1976), *petition for review denied*, 547 F.2d 1161 (3d Cir.), *vacated and remanded*, 433 U.S. 905 (1977),¹⁹ *quoted in Price v. Norfolk & Western Railway*, 618 F.2d at 1061 (emphasis supplied).

In *Harmon v. Baltimore & Ohio Railroad*, 741 F.2d 1398 (D.C. Cir. 1984), the Court of Appeals for the D. C. Circuit reached the same conclusion with regard to a railroad carpenter who was injured while repairing a hopper through which coal passes during the loading process. Adopting the *Pfeiffer* standard of coverage for employees "engaged in intermediate steps of moving cargo," the *Harmon* court reasoned that, since coal-loading equipment is essential to the movement of maritime cargo from railcars to ships, "the repair and maintenance of that equipment must also be considered as an integral part in the loading and unloading of ships." 741 F.2d at 1403-04.

¹⁹ This Court remanded the case to be decided in light of *Caputo*. The subsequent decision was not published and a petition for review was denied in *McCarthy v. Bradshaw*, 564 F.2d 89 (3d Cir. 1977).

Other circuits have similarly applied the functional relationship test derived from *Caputo* and *Pfeiffer*, in deciding that workers who maintain or repair equipment essential to loading vessels are maritime employees for LHWCA purposes.²⁰ Illustrative cases include *Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs*, 685 F.2d 1121, 1123 (9th Cir. 1982) (repair and maintenance of equipment necessary to loading ships integral to process, thus "maritime employment" for LHWCA); *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 755-56 (5th Cir. 1981) (maintenance and repair of longshoring equipment and facilities, essential and indispensable step in shiploading process, constitutes "maritime employment" for LHWCA), *cert. denied*, 454 U.S. 1163 (1982); *Garvey Grain Co. v. Director, Office of Workers' Compensation Programs*, 639 F.2d 366, 370 (7th Cir. 1981) (repair and general maintenance of conveyors and other loading equipment integral part of loading process, conferring LHWCA status on worker performing these tasks); *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d

²⁰ Although this Court has never specifically addressed the issue, it has suggested in *dictum* that mechanics who maintain loading equipment are engaged in maritime employment. In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), the Court refused to extend LHWCA coverage to a welder working on a fixed off-shore drilling platform. In language important to this case, the Court pointedly remarked that the employee's "work had nothing to do with the loading or unloading process, nor [was] there any indication he was even employed in the maintenance of equipment used in such tasks." 470 U.S. at 425 (emphasis supplied). Furthermore, this Court has held that the specific jobs listed in § 902(3) include only "a part of the larger group of activities that make up 'maritime employment'..." *P.C. Pfeiffer Co. v. Ford*, 444 U.S. at 77 n.7.

30, 37 (1st Cir. 1980) (repair and maintenance of integrated shiploading equipment qualifies as maritime employment for LHWCA), *cert. denied*, 452 U.S. 938 (1981); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978) (gear lockerman who repaired and maintained stevedore equipment performed integral and essential part of longshoring operations).

Administrative decisions affording LHWCA coverage to maintenance mechanics have proliferated following the 1972 legislation. In some of these decisions coverage is premised on the same rationale as in *Caputo*, *Price* and *Harmon*: since the repair and maintenance of loading equipment is integral and essential to the movement of maritime cargo, employees who perform such work have the status of LHWCA employees. See, e.g., *Wuellet v. Scappoose Sand and Gravel Co.*, 15 BEN. REV. BD. SERV. (MB) 223(ALJ) (Dec. 29, 1982) (LHWCA coverage for mechanic injured while changing conveyor belt), *aff'd*, 18 BEN. REV. BD. SERV. (MB) 108 (Feb. 20, 1986); *Jackson v. Atlantic Container Corp.*, 15 BEN. REV. BD. SERV. (MB) 473 (Aug. 24, 1983) (LHWCA coverage for terminal mechanic who performed minor repairs and monthly maintenance on linkspan); *Ganish v. Sea-Land Service, Inc.*, 13 BEN. REV. BD. SERV. (MB) 419 (April 28, 1981) (LHWCA coverage for terminal mechanic who regularly maintained and repaired equipment used to move cargo containers and loading personnel), *aff'd sub nom. Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs*, 685 F.2d 1121 (9th Cir. 1982); *Lewis v. Pittston Stevedoring Corp.*, 7 BEN. REV. BD. SERV. (MB) 691 (Feb. 10, 1978) (LHWCA coverage for terminal garage mechanic who regularly repaired and maintained cargo

handling tools and equipment). In an alternative approach, the Benefits Review Board has construed "harbor workers" to encompass mechanics who repair the cargo loading equipment installed at a maritime terminal. See *Stewart v. Brown & Root, Inc.*, 7 BEN. REV. BD. SERV. (MB) 356, 365 (Jan. 12, 1978) ("harbor workers" defined to include "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)" for purposes of the LHWCA status test). These administrative decisions are not cited as meriting special deference by federal courts, cf. *Kelaita v. Director, Office of Workers' Compensation Programs*, 799 F.2d 1308, 1310 (9th Cir. 1986);²¹ rather they exemplify the consistent pattern of judicial and administrative decisions, of which Congress would have been aware in 1984, in which terminal mechanics who repair loading equipment are deemed to be maritime employees under § 902(3).

Against this background it is noteworthy that in 1980 a proposal to expressly exclude workers engaged in "maintenance, or repair of gear or equipment" died in Committee. See *Herb's Welding v. Gray*, 470 U.S. 414, 423 n.9 (1985). It is also highly significant that the 98th Congress did not exclude maintenance mechanics (or railroad employees) when it otherwise restricted the scope of § 902(3) in the 1984 amendments. See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (Congress presumed aware of particular interpretations of

²¹ However, administrative findings are controlling if supported by the evidence. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d at 140 n.2.

legislative provisions when it reenacts statutory language without change).

[W]e have recognized that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication "that Congress at least acquiesces in, and apparently affirms, that [interpretation]."

Monessen Southwestern Railway v. Morgan, 486 U.S. —, —, 108 S. Ct. 1837, 1843-44 (1988) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979)). The conclusion that Congress implicitly adopted these prior judicial and administrative interpretations is more compelling when the "status" restrictions that *were* added by the 1984 amendments are considered. After LHWCA benefits had been awarded in the early 1980's to security workers, museum employees, restaurant employees, and workers repairing recreational vessels under sixty-five feet in length, it is not a coincidence that Congress excluded some of these workers from coverage in the 1984 version of §§ 902(3)(A), (B), and (F). Cf., e.g., *McCarthy v. The Bark Peking*, 716 F.2d 130 (2d Cir. 1983) (according LHWCA status to worker painting museum vessel), *cert. denied*, 465 U.S. 1078 (1984);²² *Arbeen v. McRoberts Protective Agency*, 642 F.2d 672 (2d Cir.) (according LHWCA status to pier security guards), *cert. denied*, 454 U.S. 836 (1981);²³ *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994 (5th Cir.) (according LHWCA status to marine carpenter who re-

²² 33 U.S.C. § 902(3)(B) now excludes workers employed by museums. [JA: 47]

²³ 33 U.S.C. § 902(3)(A) now excludes security personnel who perform exclusively office security work. See *id.*

paired recreational vessels up to sixty feet in length), *modified on other grounds*, 657 F.2d 665 (5th Cir. 1981);²⁴ *Cefaratti v. Mike Fink, Inc.*, 83-LHWCA-1992 (ALJ) (May 2, 1984) (according LHWCA status to restaurant worker), *aff'd*, 17 BEN. REV. BD. SERV. (MB) 95 (Feb. 27, 1985).²⁵ However, the legislative history explaining the purpose of the 1984 amendments to § 902(3) expressly states:

[I]t is the intention of the Committee neither to expand nor to contract the current coverage of the Longshore Act. The Committee concurs with the view of the Senate Committee on Labor and Human Resources in this regard, which stated "... with the committee making only *limited changes* to [these sections] of the act, it is obvious that *a large body of decisional law relative to traditional maritime employers and harbor workers remains undisturbed.*"

H.R. Rep. No. 570, Part I, 98th Cong., 2d Sess. 5, *reprinted in* 1984 U.S. Code Cong. and Ad. News 2734, 2738 (1984) (emphasis supplied). To paraphrase *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980): where Congress explicitly enumerates certain exceptions to coverage, additional exceptions are not to be implied.

In 1977, without the guidance of *Caputo* and *Pfeiffer*, the Supreme Court of Virginia held that a railroad mechanic who maintained and repaired loading

²⁴ 33 U.S.C. § 902(3)(F) now excludes workers who repair recreational vessels under 65 feet in length. *See id.*

²⁵ 33 U.S.C. § 902(3)(B) now excludes workers employed by restaurants. *See id.*

equipment at the Norfolk coal piers was not a LHWCA employee because he was "not directly involved in the loading of coal." *White v. Norfolk & Western Railway*, 217 Va. 823, 833, 232 S.E.2d 807, 813, cert. denied, 434 U.S. 860 (1977) (emphasis in original). Focusing on the fact that plaintiff was "not actually handling any cargo, either manually or mechanically," *id.*, and borrowing language from *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir.1975) ("realistically significant relationship to 'traditional maritime activity'"), cert. denied, 429 U.S. 868 (1976)²⁶ and *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 539 (5th Cir. 1976) ("directly involved"), vacated and remanded, 433 U.S. 904 (1977), the *White* court found that the plaintiff was outside the scope of the Act because he was "only maintaining the electrical devices on the shore and attached to the pier, work which is not the traditional

²⁶ The *Weyerhaeuser* opinion is inapposite authority for analyzing the status of workers at a commercial loading pier: the *Weyerhaeuser* plaintiff was a pondman injured while working on a sawmill log pond, not a repairman maintaining shiploading equipment beside a deep water pier. See 528 F.2d at 961 (pondman's work not maritime employment in traditional sense; no "realistically significant relationship" to traditional maritime activity involving navigation and commerce on navigable waters). As pointed out in *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1049 (5th Cir. 1982), cert. denied, 459 U.S. 1170 (1983), *Weyerhaeuser* formulated its "significant relationship" status test from language in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), which addressed the separate question of federal admiralty jurisdiction in claims arising from aviation accidents. The *Weyerhaeuser* holding does not speak persuasively as to the intended reach of federal jurisdiction in the context of maritime employment compensation.

work of a ship's service employee."²⁷ 217 Va. at 833, 232 S.E.2d at 813 (emphasis in original). In the decade following *White*, not one reported court opinion has acknowledged *White* as persuasive authority. Both the Ninth and Fifth Circuits, relied on by the *White* court, have subsequently held that workers who repair and maintain shiploading equipment are within the scope of the LHWCA. See, e.g., *Sea-Land Services, Inc.; Hullinghorst Industries, Inc.; Brady-Hamilton Stevedore Co. v. Herron*.

Given the tenuous underpinnings of *White* and the subsequent clarification of the LHWCA status test in the federal fora, the lower courts in Virginia had concluded that they were no longer bound under *stare decisis* to follow *White*. See, e.g., Opinion of Judge

²⁷ To highlight the confusion of the Virginia court's reliance upon *White* one need only note that line tending was conceded by the Virginia Supreme Court to be within the definition of "maritime employment." 217 Va. at 830, 232 S.E.2d at 811. Line tender/helpers are in the same department as respondent Goode (Motive Power-Piers). Goode had also worked as a line tender/helper, and a line tender/helper was assisting Goode when he was injured. [JA: 167]

Another case, infrequently followed, which resorts to the "traditional maritime activity" analysis is *Conti v. Norfolk & W. Ry.*, 566 F.2d 890 (4th Cir. 1977), decided immediately after *Caputo*. See *supra* note 17. *Conti* involved the brakemen who release the cars in the Lambert's Point Barney Yard and uncouple the cars at the Barney Pit as described *supra* p. 3. The Fourth Circuit applied a "traditional railroading vs. traditional maritime tasks" test to determine coverage. See 566 F.2d at 895 (workers engaged in unloading train, not loading vessel). This analysis was not even mentioned in the *Price* opinion and has not been adhered to in the Fourth Circuit. See *Harmon v. Baltimore & O.R.R.*, 741 F.2d at 1404 (Fourth Circuit has "moved away" from *Conti* analysis).

Stephens in *Turnista v. Chesapeake & Ohio Railway*, No. 8690-WS (Newport News Cir. Ct. May 21, 1984), reprinted in the appendix to the petition for *certiorari* at pages 49A, 61A-62A (respectfully declining to follow *White* and concluding *Price* is controlling); Opinion of Judge Waters in *Goode*, JA: 37-38 (federal authorities "more persuasive" on issue of application of federal statute); Opinion of Judge Smith in *Schwalb*, JA: 29 (relying on interpretations of LHWCA expressed by U.S. Supreme Court); and Opinion of Judge Schlitz in *McGlone*, JA: 33 (conflict between state and federal authority must be resolved in favor of latter). Doubtless Virginia's trial judges were surprised when the Supreme Court of Virginia used its review of the *Schwalb* and *McGlone* appeals not to reject or distinguish but to reaffirm the vitality of its *White* rationale.

In its March 4, 1988 opinion, the *Schwalb-McGlone* court opined that Congress did not intend the 1972 amendments to "have such pervasive and preclusive effects" as had been attributed to them by, for example, the Fourth Circuit Court of Appeals in *Price*. 235 Va. at 32, 365 S.E.2d at 744. Rejecting again the functional relationship formula that has been the linchpin of the LHWCA status test,²⁸ *id.* at 31, 365 S.E.2d at 744, the Supreme Court of Virginia regressed to an illogical demarcation of coverage where "workers who perform purely clerical tasks" are indistinguishable from workers who perform repairs and maintenance "such as painting" (a clear reference to *Price*), *id.* at 33, 365 S.E.2d at 745, both groups

²⁸ See *supra* p. 12-17 (*Caputo* and *Pfeiffer* created functional relationship test for LHWCA status, applied by judicial and administrative tribunals).

failing to fulfill the Virginia Supreme Court's unjustified requirements for LHWCA coverage. The court recast its LHWCA status test in terms of an "essential elements" standard, which it described as "more nearly akin to the 'significant relationship' standard . . . adopted in *White* than the 'overall process' construction invoked by the defendant." *Id.* Thus clothed in semantics, the court ruled that Schwalb and McGlone were non-covered workers, "perform[ing] purely housekeeping and janitorial tasks." *Id.*²⁹

Under any of the federal or administrative authorities construing § 902(3) since the 1972 amendments, respondent Goode would clearly be a maritime employee, either as a harbor worker or as a person engaged in longshoring operations. The Virginia Supreme Court's memorandum decision in *Goode*, issued one month after the *Schwalb-McGlone* decision, evinces the state court's unyielding refusal to analyze the functional relationship of specific pierside jobs to the loading process, and repeats the court's apparent intention to exclude all but those labeled longshore-

²⁹ Both Schwalb and McGlone were pierside mechanical workers at a coal loading maritime terminal similar to Lambert's Point. Their primary job responsibility was to ensure the continuous functioning of coal loading equipment by retrieving accumulations of coal from around and beneath the loading equipment and conveyor belts. Schwalb was injured on her way to perform a thorough cleaning of the trunnion rollers that rotate the dumper; McGlone was injured while blowing trapped coal from beneath the moving conveyor belt with an air hose. Even the Virginia Supreme Court acknowledged that failure to remove these coal accumulations would eventually cause malfunctions and interruptions in the coal loading process. 235 Va. at 29, 365 S.E.2d at 743. [JA: 21]

men and shipbuilders from LHWCA benefits.²⁰ The Virginia Supreme Court now appears entrenched in its defiant disavowal of controlling federal precedent.

II. The Virginia Supreme Court Decision Offends The Congressional Goal Of A Uniform Standard

Disdaining the federal courts' uniform interpretation of the LHWCA status test, the Virginia Supreme Court has ignored the congressional mandate to apply a "simple, uniform standard of coverage," and the instruction of *Caputo*, *Pfeiffer*, and their progeny. Maintaining uniformity in the application of the LHWCA is at least as important today as it was when the Court initially undertook to construe the LHWCA and its relationship with other compensation plans.

It is clear that railroad employees are eligible for coverage under the LHWCA and that such coverage is exclusive of any potential FELA recovery. *See supra* note 18 and cases cited therein. Under the LHWCA both parties are free of the costs (particularly attorney's fees) and the delay, as well as the uncertainty of result, of litigation. As the United States pointed out in its *amicus curiae* brief, numerous other potential claimants may be adversely affected by a failure to provide coverage, thus

²⁰ The Virginia Supreme Court's rationale would also bar from LHWCA coverage workers who maintain or repair shipbuilding or ship repairing equipment. This position also conflicts directly with the Fourth Circuit's holding in *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978), and ignores this Court's repeated observation that the maritime occupations specifically listed in § 902(3) were not intended to be exclusive. *See Herb's Welding*, 470 U.S. at 421 n.9; *Pfeiffer*, 444 U.S. at 77-78 n.7.

frustrating the clear intention of Congress to provide uniform relief to all those, not otherwise excluded, engaged in these activities. *See* Brief For The United States As *Amicus Curiae* (in support of petition) at 7 n.6.

Decisions of the United States Supreme Court are final and authoritative with respect to the construction and application of federal statutes. *Monessen Southwestern Railway v. Morgan*, 486 U.S. — , — , 108 S. Ct. 1837, 1842-44 (1988). Absent clear words to the contrary, construction of the language in a federal statute is a federal question. *Western Air Lines v. Board of Equalization*, 480 U.S. 123, 129 (1987). A state court is not free to follow its own dictates or precedent in areas of federal substantive law in the face of federal authority to the contrary. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). The Supreme Court of Virginia appears not to acknowledge this as the law. As this Court admonished in an earlier demonstration of independence by the Supreme Court of Virginia:

[T]he vice of this position is that, in following its own prior decision, the court ignored the decision of this court to the contrary. This lawfully it could not do, the question, as we have shown, being a federal question to be determined by the application of federal law. The determination by this court of that question is binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding.

Chesapeake & Ohio Railway v. Martin, 283 U.S. 209, 220-221 (1931).

The mischief created by the aberrant state court decisions in the case at bar and the *Schwalb* and *McGlone* cases will not be limited to the parties in this action. The judges in Virginia's trial courts, as well as administrative law judges hearing Virginia cases, must now immediately confront the dilemma of divergent authority within the state on the threshold question of jurisdiction. Employers in Virginia now face uncertainty as to their responsibility to secure compensation under the LHWCA.

The brief filed in support of the petition by *amici curiae* Association of American Railroads and National Association of Railroad Trial Counsel pointed out many practical problems engendered by the lack of uniformity in the application of coverage. They include, but are not limited to, the following:

A) Mandatory notice deadlines under LHWCA, not under FELA;

B) Adversarial nature of FELA litigation requires immediate, extensive claim investigation, LHWCA does not;

C) Potential of litigation in FELA cases makes health care professionals less likely to provide necessary services voluntarily;

D) Potential penalties to employer for failure to secure immediate LHWCA compensation for employee while interim disability benefits are available to employee through application to Railroad Retirement Board; and

E) Problems with effective negotiation and appropriate resolution of employee injury claims in an economic and expeditious manner.³¹

See Brief of the Association of American Railroads and National Association of Railroad Trial Counsel (in support of petition) at 8-11.

An indirect consequence of the Virginia Supreme Court decision will be "forum shopping" by, for example, pierside railroad workers in other states who seek to avoid the exclusive jurisdiction of the LHWCA. Due to the vagaries of Virginia's venue statute, a resident of any state can bring an action in Virginia against an employer that does business in the state of Virginia; the action is not vulnerable to dismissal or transfer even if the plaintiff and all witnesses reside in another state and the accident occurred outside Virginia. Va. Code § 8.01-265 (1950).³²

³¹ Another hindrance to effective resolution of these conflicting sources of recovery is the "two bites at the apple" doctrine established in *Freeman v. Norfolk & W. Ry.*, 596 F.2d 1205, 1208 (4th Cir. 1979). The *Freeman* court concluded that a railroad employee could secure LHWCA compensation without prejudice (other than offset) to a subsequent FELA action for the same injury. Despite criticism in other courts, the principle still applies in this Circuit. Cf. *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1053 (4th Cir. 1980) (Widener, J. concurring and dissenting) (LHWCA claimant working for railroad has "best of both worlds"). In selective "deference" to federal authority the Supreme Court of Virginia did acknowledge the viability of this principle. *Schwalb-McGlone*, 235 Va. at 34 n.2., 365 S.E.2d at 745 n.2. [JA: 27]

³² The constitutionality, both under the U.S. and Virginia Constitutions, of this statute is before the Supreme Court of Virginia in *Seaboard System R.R. v. Caldwell*, No. 870490, appeal granted (Va. Sup. Ct. Mar. 22, 1988). Oral argument was heard on April 19, 1989.

If the *Goode* decision stands uncorrected, there is little doubt that Virginia courts will soon be inundated by foreign FELA actions, brought by maritime plaintiffs escaping the federal and state courts elsewhere that adhere to the federal standard. See Brief For The United States As *Amicus Curiae* at 18. This is hardly the result Congress intended when it amended the LHWCA to establish a simple, uniform standard of coverage.

To allow the Virginia Supreme Court decision to stand would frustrate the spirit and purpose of the LHWCA, create a favored class of maritime employees, perpetuate a dichotomous approach to the LHWCA status test, allow state courts on an issue of federal law intentionally to ignore federal cases to the contrary and burden the courts with unnecessary litigation.

CONCLUSION

For the above reasons, petitioner Norfolk and Western Railway Company respectfully submits that the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1988

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,
v.

ROBERT T. GOODE, JR.,
Respondent.

**BRIEF ON THE MERITS OF RESPONDENT
ROBERT T. GOODE, JR.
ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA**

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QUESTIONS PRESENTED

I. Whether a railroad worker who was injured while repairing railroad equipment used for braking and stopping hopper cars and who does not perform traditional longshoring activities, is a "maritime employee" under the Longshore and Harbor Workers' Compensation Act?

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NORFOLK AND WESTERN RAILWAY COMPANY,
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**BRIEF ON THE MERITS OF RESPONDENT
ROBERT T. GOODE, JR.
ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA**

Respondent, Robert T. Goode, Jr., respectfully prays
that this Court affirm the Judgment of the Supreme Court
of Virginia.

STATEMENT OF THE CASE
Procedural Summary

Robert T. Good, Jr., filed suit under the Federal
Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, against
the Norfolk & Western Railway Company ("Railroad") in
the Circuit Court for the City of Norfolk, Virginia for

injuries sustained on February 11, 1985, while performing maintenance on a retarder at the Railroad's Lambert's Point Yard in Norfolk, Virginia. The injury resulted in the loss of an index finger and permanent damage to another finger as well as to the hand. Goode was unable to work in his occupation as a machinist from the date of the accident to August 1, 1985.

The Railroad moved to dismiss the suit contending that Goode was covered by the Longshore Harbor Workers' Compensation Act ("LHWCA") and thus the LHWCA was the exclusive remedy for his injuries. On November 13, 1986, Judge Charles R. Waters, II, of the Circuit Court of the City of Norfolk issued a letter opinion dismissing the suit holding that the LHWCA provided Goode's exclusive remedy. J.A. 34-39. An Order to this effect was entered by the Court on December 17, 1986. J.A. 43.

The Supreme Court of Virginia granted an appeal to Goode and on April 22, 1988, issued a decree reversing the decision of the Circuit Court and remanding the case for a trial on the FELA claim. J.A. 46. The Supreme Court of Virginia did not render an opinion in this action but simply cited in the decree its opinion in *Schwalb v. Chesapeake & Ohio Railway Co.*, 235 Va. 27, 365 S.E.2d 742 (1988), decided on March 4, 1988.

This Court granted the Railroad a Writ of Certiorari to the Supreme Court of Virginia.

Factual Summary

Robert T. Goode, Jr. is employed as a machinist in the Motive Power Department of the Railroad. Machinists are

assigned jobs based solely on seniority by hiring date. They may be assigned to work in a geographic area that ranges from Norfolk, Virginia to Crewe, Virginia, approximately 125 miles from Norfolk. J.A. 191, 195.

One of the sites where a machinist may be assigned to work in Norfolk is the Lambert's Point Yard. The Lambert's Point Yard is a terminal where coal mined in Virginia, West Virginia and Kentucky is brought by train for transfer to ships. The loaded hopper cars travel from the coal fields to the Lambert's Point Yard where they are unloaded by the dumpers and then return empty to the mines in a continuous cycle. J.A. 35, 192, 196.

Goode worked at the Lambert's Point Yard. At the Lambert's Point Yard, a machinist may be assigned to work at the 38th Street Car Shops, the Motive Power Building or the Round House. J.A. 191, 195.

At the Lambert's Point Yard a machinist can be assigned a number of tasks, including the repair of railroad cars, rerailing derailed railroad cars, repairing and maintaining pushers (small electronic locomotives) and the Barney (a device that pushes railroad cars up an incline), and repairing and maintaining the dumpers. J.A. 156, 191, 195.

On February 11, 1985, Goode was assigned the duty of performing maintenance on an air cylinder on a retarder which is located on the south side dumper at the Lambert's Point Yard. While performing the maintenance, Goode was injured.

A retarder is a device used to stop or slow the movement of railroad cars. Retarders are used throughout the

Railroad's system and are common to all railroads and their use is not limited to loading or unloading ships. J.A. 191, 195. Dumpers are found at other railroad hopper car unloading facilities which have no connection with loading ships. J.A. 152. The south side dumper is one end point of a continuous cycle of railroad cars which begins at the coal mines. J.A. 35, 192, 196.

Once a railroad car entering the dumper is stopped, it is seized by mechanical arms, turned upside down and the coal is dumped from the car to a conveyor belt. After the coal has been dumped out of the car, the car moves by gravity to a "kick-back" incline, then by gravity it is free-rolled to an empty return yard for its trip back to the coal fields. J.A. 35.

After the coal is dumped from the railroad cars, it is carried by a conveyor belt system, known as Belt B, from the south side dumper to the Belt Change House. In the Belt Change House the coal is transferred to another conveyor belt system, consisting of Belts C, D, and E, that carries the coal to large chutes on the pier for loading onto ships. J.A. 165, 192, 196. The C belt may be reversed and the coal transferred through a chute into railroad hopper cars located on the track outside the Belt Change House rather than forward to D Belt. J.A. 166, 167. The coal can be diverted from the piers. J.A. 149.

As a railroad machinist, Goode is eligible for retirement benefits under the Federal Railroad Retirement System and to receive Railroad Retirement Board Unemployment Benefits when furloughed or dismissed

due to illness or a disabling non-work related injury. The employment contract under which Goode works is negotiated under the Federal Railway Labor Act and his right to a hearing and to appeal any disciplinary action imposed by the Railroad is mandated by that Act. J.A. 192, 196.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Virginia that Robert T. Goode, Jr. is not a maritime employee under the Longshore and Harbor Workers' Compensation Act is consistent with the decisions of this Court. At the time he was hurt, Goode was performing traditional railroad work. He was repairing a railroad retarder system the purpose of which is to stop and hold railroad cars. He was not performing longshoring tasks when he was repairing the retarder and was not a "maritime employee" under the LHWCA. See *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). A review of the Legislative history and amendments to the Longshore and Harbor Workers' Compensation Act since its enactment in 1927 indicate that the intent of Congress was to extend coverage under the Act to workers who were otherwise not provided a remedy. That is not the case before the Court. Robert T. Goode, Jr., as a railroad worker, has a remedy for the injury he suffered on the job; the Federal Employers' Liability Act. The argument put forward by the Railroad does not implement the Congressional

intent, it merely substitutes a federally enacted compensation scheme with a strictly controlled measure of compensation.

ARGUMENT

I. CONGRESS DID NOT INTEND TO SHIFT COVERAGE FOR INJURED RAILROAD WORKERS FROM THE FELA TO THE LHWCA BY THE 1972 AMENDMENTS TO THE LHWCA.

In 1972 Congress was faced with the problem that many states had inadequate workers' compensation statutes. Longshoremen and ship repairmen injured over navigable waters could expect to have significantly better compensation than workers who were doing the same type of work but were not over the water. The nature of longshoring and ship repair work placed these workers in a situation where they might move in and out of LHWCA coverage numerous times during any particular day depending on which side of the gang plank they were on at any particular time. *U.S. Senate Committee on Labor and Public Welfare, 92nd Cong., Senate Bill 2318 pp. 74-75.*

Congress amended the LHWCA to address this problem by extending the Act's coverage beyond its traditional coverage over navigable waters to include other categories of maritime employees. Since the 1972 amendments, a worker's eligibility for compensation depends not only where that worker was injured, but also on

whether the worker was engaged in "maritime employment." These are known as the status and situs tests.¹

As a railroad worker Goode is covered by the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* (hereinafter "FELA"). The FELA has been the equivalent of a compensation statute for railroad workers since 1908.

The FELA has been consistently viewed as remedial in nature. *Hoepfner v. Northern Pacific Railway Company*, 61 F. Supp. 819 (D. C. Mont. 1945). The FELA has worked well, has not been under attack for any inadequacy by the

¹ The 1972 Amendments to the LHWCA enumerated this two-pronged test. Section 903(a) of the Act sets forth the "situs" test as to where a longshoreman's claim must occur. It states:

Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a).

Section 902 of the Act defines the "status" test, that is, the status an employee must occupy before the LHWCA applies. It states:

The term 'employee' means any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder and shipbreaker

33 U.S.C. § 902(3).

workers protected by the FELA or by their employers, the railroads. Even though the FELA is a "jury trial" system rather than a "no fault" compensation system, workers have received adequate compensation for on-duty injuries. When the LHWCA was amended the focus was on inadequate state laws and compensation systems, and not on the alternative federal system as embodied in the FELA.

The purpose of the 1972 amendments was to correct the checkered coverage that certain maritime employees had faced. The legislative history is replete with discussion and analysis focusing on the needs of the stevedores and the ship builders. It is noteworthy that the U. S. Senate hearings on Senate Bill number 2318 (1972 Longshoremen's Harbor Workers' Compensation Acts amendments) are singularly silent with respect to railroad workers. The reason for this silence is not hard to understand. At the time the amendments were being considered, there was no inadequacy in or controversy with respect to the compensation system for railroad workers, the FELA. The entire focus of the legislation was on the inadequacies and inconsistencies of the existing state laws, as well as the need to improve the LHWCA's benefits and protection. The Railroad is now trying to use these amendments to expand the coverage to include railroad workers such as Robert Goode, a prospect that the Congress never intended to include. When Congress amended the Longshore and Harbor Workers' Compensation Act in 1972 and again in 1984, the legislative history indicates that there was no intention to effect the rights of railroad workers such as Robert Goode.

During the several years of consideration by Congress leading to the 1972 amendments to the LHWCA, there were a number of hearings and numerous witnesses attesting to the problems with existing state laws and the need to improve the LHWCA. A review of the Senate and House Hearings, as well as the Committee Reports and Debates shows no testimony or questions by either railroad employers, employees or their collective bargaining agents on the desirability of bringing such workers under the Longshore and Harbor Workers' Compensation Act instead of the FELA protections. *See 1972 Longshoremen's Act Amendments, U. S. Senate Hearings on Senate Bill 2318.*

While the absence of involvement by effected parties generally does not preclude Congress from acting, the situation with respect to workers' compensation programs may be somewhat different. Historically, all workers' compensation programs represent a legislative bargain between employers and their employees whereby the employee gives up certain rights against the employer in return for certainty of medical treatment and benefits, while the employer gives up certain defenses it may have against the employee in connection with the claim. This is the essence of the "no fault" compensation system. It is inconceivable that sophisticated and politically active employers, such as the railroads and their equally sophisticated and active employee representatives would not have been involved in the legislative process if Congress had intended to effect their rights. Their total absence from the scene must be given weight with regard to the Congressional intent. That Congress was aware of the different compensation systems effecting employees is seen by the way in which a proposal to shift

protection of certain employees from the Jones Act, 40 U.S.C. § 688 *et seq.*, to the LHWCA was treated during the consideration of the 1972 amendments. A proposal to extend coverage of the LHWCA to workers engaged in off shore oil drilling was examined in detail with extensive testimony from effected employers, unions, trial lawyers and others. 1972 *Longshoremen's Act Amendments*, U. S. Senate Hearings on Senate Bill 2318, pp. 574, 591, 351, 393. Congress decided to take no action on this proposal. U. S. Senate Committee on Labor and Public Welfare, 92nd Cong., Senate Bill 2318, pp. 537-538.

There are two significant points regarding this off shore drilling issue. First, when Congress contemplated changing the relationship of parties concerning compensation, those parties were brought into the discussions. Second, the Jones Act is a compensation system based on the FELA, in fact, it incorporates FELA provisions. See 46 U.S.C. § 688, *et seq.* Congressional intent not to change the Jones Act suggests that as a compensation system, the FELA approach was not considered inadequate by the Congress, thereby lending even more support to the view that erosion of FELA protection was not contemplated.²

² It should also be noted that Congress was not unaware of the FELA interplay with the LHWCA, and the District of Columbia compensation statute specifically excludes railroad workers from its coverage. 36 D.C. Code § 501(2), *et seq.* That statute, an appendage to the LHWCA, operated from 1927 until 1982 as the Worker Compensation Statute for private employees in the District of Columbia. To suggest that Congress intended to exclude railroad workers from FELA coverage everywhere except in the District of Columbia by virtue of the 1972 amendments creates an unrealistic legislative inconsistency.

Virtually every major decision of this Court since 1972 concerning the LHWCA has required an analysis of the legislative intent. See *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), *P.C. Pfeiffer v. Ford*, 444 U.S. 69 (1979), *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). In the most recent case of *Herb's Welding, Inc. v. Gray*, this Court, in discussing the coverage of certain offshore drilling employees, referred to the legislative history and stated:

... the absence of any mention of drilling platforms in the discussion of the LHWCA, combine to suggest that the 1972 Congress at least did not intentionally extend the LHWCA to workers such as Gray. . . .

470 U.S. at 420.³

Regardless of the impact of Congress' actions on longshoremen engaged in loading and unloading activities, there is nothing in the legislative history to suggest that Congress intended to effect the injury compensation program of workers engaged in traditional railroading activities, who are identified as railroad workers.

³ Following the Supreme Court decision in *Herb's Welding, Inc. v. Gray*, which clearly intends to stop the reckless extension of coverage of the LHWCA, one Federal District Court has similarly limited the coverage of the LHWCA. In *West v. Chevron, U.S.A., Inc.*, 615 F. Supp. 377 (D.C. La. 1985), the United States District Court for the District of Louisiana citing *Herb's Welding*, stated, " 'Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading'. . . . This Court heeds the signal of the Supreme Court, and believes it is a healthy sign." 615 F. Supp. at 381. Robert Goode urges this Court to also "heed the signal" and not lump an employee from the traditional railroad craft of machinist into the craft of Longshoremen.

A careful examination of both the FELA and LHWCA reveals that there was no revocation of power previously granted by Congress under the FELA, nor expansion to cover workers like Goode under the LHWCA. In fact, in the legislative history of the 1972 Amendments to the LHWCA, it was stated:

The committee does not intend to cover employees by the LHWCA who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activities.

See *U.S. Code Congressional Admin. News*, 92nd Congress, 2nd Session, Volume 3, Page 4699 at Page 4707.

This Congressional intent to not expand coverage to workers such as Goode, is also supported by an explanation of the amendment in "Coverage under the Longshoremen's and Harbor Workers' Compensation Act," which was printed in the *Federal Register* on May 23, 1974:

In amending the Longshoremen's and Harbor Workers' Compensation Act, Congress did not exclude any employees or others previously covered nor did it delineate any new or different kinds of work for which compensation might be paid. The amended provisions specifically refer to those in traditional types of work done by longshoremen and harbor workers and other employees engaged in maritime employment.

Volume 39, Federal Register, 101, Section 710.

Because the Congress never intended to extend LHWCA coverage to a railroad worker such as Goode, the judgment of the Supreme Court of Virginia should be affirmed.

II. A RAILROAD WORKER MAINTAINING RAILROAD EQUIPMENT AND NOT PERFORMING TRADITIONAL LONGSHORING IS NOT A "MARITIME EMPLOYEE" UNDER THE LHWCA.

As discussed above, when enacting the 1972 amendments to the LHWCA, Congress intended to exclude from coverage persons who do not perform traditional types of work done by longshoremen and harbor workers. The Virginia Supreme Court, relying upon its decision in *Schwalb v. Chesapeake & Ohio Rwy. Co.*, 235 Va. 27, 365 S.E.2d 742 (1988), and by implication its decision in *White v. Norfolk & Western Rwy. Co.*, 217 Va. 823, 232 S.E.2d 852, cert. denied, 434 U.S. 860 (1977), functionally concluded that the plaintiff, Robert Goode, was not performing a traditional longshoring task and thus, was not an employee under the LHWCA. This determination is consistent with judicial interpretations of LHWCA coverage since the 1972 amendments were adopted.

In *Herb's Welding Inc. v. Gray*, 470 U.S. 414 (1985), this Court was presented with the question of whether a welder working on a fixed offshore oil-drilling platform was covered by the LHWCA. The Court of Appeals for the Fifth Circuit held that Gray's work as a welder had "a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters" and therefore extended coverage of the LHWCA to him. 470 U.S. at 418-19. This Court concluded that the Fifth Circuit had taken too expansive a reading of maritime employment. 470 U.S. at 421. Concluding that Gray was not covered by the LHWCA, this Court

stated the following concerning the 1972 Amendments to the LHWCA:

The expansion of the definition of navigable waters to include rather large shoreside areas necessitated an affirmative description of the particular employees working in those areas who would be covered. This was the function of the maritime employment requirement. But Congress did not seek to cover all those who breathe salt air. *Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading*; it is "clear that persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. at 267. While "maritime employment" is not limited to the occupations specifically mentioned in Sec. 2(3), neither can it be read to eliminate any requirement of a connection with the loading or construction of ships. As we have said, the "maritime employment" requirement is "an occupational test that focuses on loading and unloading." *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 80 (1979). The amendments were not meant "to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they were injured in an area adjoining navigable waters used for such activity." HR. Rep. NO. 92-1441, p. 11 (1972); S. Rep. NO. 92-1125, p. 13 (1972). We have never read "maritime employment" to extend so far beyond those actually involved in moving cargo between ship and land transportation [footnotes omitted, emphasis added].

470 U.S. at 423-24.

Similarly, in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), this Court extended LHWCA coverage to a checker and a terminal laborer who were performing traditional longshoring functions in connection

with the movement of cargo from a ship to land transportation. In discussing the status test, this Court stated:

[The intent is] to cover those workers involved in the essential elements of unloading and loading a vessel – taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area. . . . [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truck drivers, whose responsibility on the waterfront is to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered [emphasis added].

249 U.S. at 266-67. See also *Northeast Marine Terminal Co. v. Caputo*, 249 U.S. at 266 n.27.

The *Caputo* decision makes it clear that unless the activities of an employee are closely related to the actual loading or unloading of a vessel, the employee is not covered by the LHWCA, and an employee involved in land transportation is covered by the LHWCA.

The nature of the work being performed by the employee was also emphasized by this Court in *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979), when it extended LHWCA coverage to a warehouseman who was injured while fastening military equipment to railroad flat cars and to a cotton handler who was injured while unloading a bale of cotton from a dray wagon into a pier warehouse. This Court emphasized that the plaintiffs were "engaged in the types of duties that longshoremen perform in transferring goods between ship and land transportation." 444 U.S. at 81. Performing traditional longshoring work is critical to coverage under the LHWCA. In addition, this Court reemphasized that employees involved in

land transportation are not covered by the LHWCA. 444 U.S. at 83.

Other Courts have also recognized that there are limits to coverage under the LHWCA. See, e.g., *Conti v. Norfolk & Western Railway Co.*, 566 F.2d 890 (4th Cir. 1977); *Dravo Corp. v. Banks*, 567 F.2d 593 (3rd Cir. 1977); *West v. Chevron U.S.A., Inc.*, 615 F. Supp. 377 (D.C. La. 1985); *Gatthers v. C & O Railway Co.*, Law No. 4290-G (Circuit Court of the City of Newport News, Virginia 1979); *Evans v. Norfolk & Western Railway Co.*, Law No. L84-112 (Circuit Court of the City of Norfolk, Virginia 1985).

In *Dravo Corp. v. Banks*, 567 F.2d 593 (3rd Cir. 1977), the Third Circuit held that a laborer at a shipyard whose duties had no traditional maritime characteristics but were rather typical of support services performed in any production entity, whether maritime or not, was not a covered worker under the LHWCA. 567 F.2d at 594. In *Dravo* the employees' duties included cleaning up debris around the employers' shipbuilding plant, which was considered by the employer as part of its plant maintenance program. The Third Circuit examined duties to determine the employees' status and noted that he was not directly involved in a necessary ingredient to the entire process of vessel construction but rather determined that the clearing of ice (the act Banks was engaged in when injured) was a necessary ingredient to any plant operation whether maritime or not. In making this determination that Banks was not a maritime employee, the Court in *Dravo* found that in order for an employee to be covered under the LHWCA it must be determined that the employee is an "integral part" of either the shipbuilding or unloading process. 567 F.2d at 595.

In *Conti v. Norfolk & Western Railway Co.*, 566 F.2d 890 (4th Cir. 1977), the Fourth Circuit determined that the LHWCA should *not* be extended to two brakemen and a conductor-brakeman who are employed by the Railroad at the Lambert's Point Terminal. Each of the employees had been injured while moving railroad cars through the unloading process. In concluding that the workers were not covered by the LHWCA the Fourth Circuit stated:

It is clear that in the cases before us the occupation of the plaintiffs were not of a traditionally maritime nature, but on the contrary were those traditionally associated with railroading. Their tasks and responsibilities with respect to the unloading of the coal from the hopper cars would have been the same at an inland terminal as they were at Lambert's Point, and the sophisticated automation of the facilities at the latter terminal should not obscure the basic fact that the plaintiffs were engaged in unloading a coal train, not loading a vessel. We find nothing in the amendments or the legislative history [to the LHWCA] to indicate that under the circumstances the Congress intended to transfer the redress of such injured railroad workers from the FELA to the Longshoremen's Act [emphasis added].

566 F.2d at 895.

This decision of the Fourth Circuit is directly applicable to Goode. The only difference between the Fourth Circuit decision in *Conti* and the present case, is that Goode was a railroad maintenance employee who was repairing the equipment used to brake the railroad cars prior to unloading rather than a brakeman actually participating in the unloading process and using the equipment.

Examination of the facts in the present case clearly reveals that Goode was not involved in an integral part of

the loading process. It is uncontroverted that the equipment he was required to repair was equipment designed to stop the movement of railroad cars. The retarder equipment was similar to equipment found throughout the railroad system, and was not unique to the loading of ships. There are trainmen who work in areas closer to the water than where Goode was while the cars are unloaded on the dumper. Further, the evidence is uncontradicted that Goode was one of several machinists who worked from a common seniority list, and performed varied tasks ranging from machinery repair, to railroad locomotive repair, to railroad car repair. Machinists are a craft that work throughout the railroad system. There are railroad hopper car unloading systems that use conveyor belts on which coal is unloaded at numerous sites located throughout the railroad system that have nothing to do with loading or unloading ships.

It is true that a line must be drawn somewhere, as clearly there are piers and ships are loaded at the Terminal. It is suggested that a logical point is the Belt Change House where the coal is transferred from one set of conveyor belts to the conveyor belts that take the coal directly to the ship. From this point on the machinery is clearly an integral part of the ship loading process.

To maintain, as the Railroad does, that all equipment on the east end of Lambert's Point Yard is an integral part of the loading process is illogical. Extended, this argument would include the coal mine worker who started delivery of the cars to the railroad, as would the engineer who runs the train, the brakemen who ride railroad cars on the hump yard at the east end of Lambert's Point, as well as the maintenance of way employees who lay the

track on which the railway cars roll on the way to the dumpers. Instead, the Court is urged to view the railroad cars as passing in a continuous cycle from the mines, to the dumpers, and back to the mines. That is indeed what actually transpires. Neither the cars, nor the machinery to stop the car, is involved in a ship loading process. This equipment brings the coal to the terminal. It follows that neither the men involved in car starting and stopping, railroad brakemen, nor workers who repair the machinery to stop the cars are an integral part of the ship loading process.

The Petitioner in this case is asking this Court to engage in an extension of LHWCA coverage which was clearly not the intent of Congress. It is asking this Court to designate a new and different kind of work as covered employment under the LHWCA.

This Court has recognized that there must be a boundary to coverage under the LHWCA. See *Herb's Welding*, 470 U.S. at 426-27. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 223-24 (1969). In *Herb's Welding*, *Caputo*, and *Pfeiffer*, this Court established that line. If a worker is performing traditional longshoring work and is involved in moving cargo between ship and land transportation, the worker will fall within LHWCA coverage. Conversely, if a worker is not performing traditional longshoring work or is not involved in moving cargo between ship and land transportation, the worker is not covered by the LHWCA. Goode, a railroad employee, was performing maintenance to equipment which is unique to railroad operations and found throughout the railroad system. The work Goode was performing is not traditional longshoring work but is traditional railroad work.

The equipment Goode was working on is used to brake railroad cars, it is not ship loading equipment. Goode was not involved in ship loading or unloading activities, but in traditional railroad activities; he is covered by FELA as opposed to LHWCA. The only factor which brings up the issue of LHWCA coverage is that Goode was performing maintenance to the railroad equipment at the Lambert's Point Terminal. LHWCA coverage is not an issue for the same class of railroad employee performing the same work at another Norfolk and Western facility. This single factor is not sufficient to take Goode out of the FELA scheme and place him under LHWCA. Robert Goode is not a maritime employee under the LHWCA.

III. CONGRESS INTENDED THAT THE FELA REMAIN THE EXCLUSIVE REMEDY FOR INJURED RAILROAD WORKERS.

Congress took possession of the field of federal employers' liability for injuries to employees involved in interstate transportation by rail when it enacted the FELA. The exclusivity aspect of this remedy was supported in the case of *Hosman v. So. Pacific Co.*, 83 P.2d 88, cert. denied, 306 U.S. 656 (1939). Like the LHWCA, the FELA is remedial in nature and should be construed so as to advance the remedy given by Congress and not to narrow it. See *Hoepfner v. Northern Pac. Rwy. Co.* 61 F. Supp. 819 (D.C. Mont. 1945).

The FELA has also been noted by Courts to be humanitarian in nature and should be liberally construed. In the opinion of *Johnson v. So. Pacific Co.*, 196 U.S. 1 (1904), this Court stated the following with regard to the predecessor to the present FELA:

The history of the Federal Employers' Liability Act and its remedial purpose impel to the conclusion that

it should be liberally construed as to the inclusion of its beneficiaries in order to effect its remedial purpose notwithstanding the fact that it is in derogation of the common law.

The liberal purpose of the FELA must be kept in mind when confronting arguments which would restrict an employers' liability under the Act. *See Baker v. Baltimore & Ohio Rwy. Co.*, 502 F.2d 638 (6th Cir. 1974). Clearly, the Congress and the authorities support the proposition that an injured railroad worker is entitled to a trial by jury on the issues of negligence and damages. To allow this Railroad to avoid a trial by jury by forcing its employees to accept Workmen's Compensation benefits would indeed be defeating the remedial purpose of the Act, which has been recognized by both the Courts and Congress.

CONCLUSION

For the above reasons, respondent Robert T. Goode, Jr. respectfully submits that the judgment of the Supreme Court of Virginia should be affirmed.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE,
Respondents.

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

ROBERT T. GOODE, JR.,
Respondent.

**PETITIONERS' REPLY BRIEF
ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA**

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EDWARD L. OAST, JR.**
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 87-1979

CHESAPEAKE AND OHIO RAILWAY COMPANY,
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v.
NANCY J. SCHWALB AND WILLIAM MCGLONE,
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NORFOLK AND WESTERN RAILWAY COMPANY,
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ROBERT T. GOODE, JR.,
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**PETITIONERS' REPLY BRIEF
ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA**

Petitioners Chesapeake and Ohio Railway Company and Norfolk and Western Railway Company¹ jointly submit this brief in reply to the respondents' briefs on the merits in these consolidated cases.

¹ Pursuant to Rule 28.1 Petitioners state that the prior listings of corporate affiliates in their Briefs on the Merits are currently accurate.

ARGUMENT

Respondents Schwalb, McGlone, and Goode want to rewrite the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, to exclude:

- (1) all pierside workers who are employed by railroads; and
- (2) all pierside workers who directly further longshoring operations without actually loading cargo.

In other words, respondents want to rewrite the LHWCA to include restrictions never contemplated by its authors. Respondents' formulation of the LHWCA status requirement, like that of the Virginia Supreme Court, has no basis in either the actual language or the legislative history of the Act and is inconsistent with decades of judicial and administrative decisions. This Court should confirm the initial determinations in these cases that the LHWCA extends to railroad workers engaged in maritime employment whose daily work ensures the ongoing productiveness of shiploading equipment.

I. The LHWCA Extends to Railroad Workers Who Are Engaged in Maritime Employment

Since 1908, the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, has provided a mechanism for the recovery of tort damages by railroad employees injured in the course of railroad employment. However, beginning with the adoption of the LHWCA in 1927, railroad workers injured in maritime employment have been compensated under the LHWCA. The LHWCA expressly provides that an

employer's liability for any injury to a covered employee is exclusive and supplants any other basis for liability. 33 U.S.C. § 905 (1982 and Supp. IV 1986). Although the Act expressly excludes some categories of workers found on or near maritime locations,² the LHWCA has never excluded railroad workers as a class from its coverage. In 1928, Congress enacted legislation adopting the LHWCA to compensate workers' injuries in the District of Columbia; railroad workers *were* expressly excluded from the coverage of the District of Columbia Workers' Compensation Law.³ This statutory history leads to the inescapable conclusion that Congress was aware that the LHWCA applied to railroad workers and that Congress deliberately included railroad workers outside the District of Columbia within the LHWCA's coverage.

² For example, Congress specifically excluded seamen from LHWCA coverage under the 1927 Act and retained this exclusion in the 1972 and 1984 Amendments, presumably in response to the stated preference of seamen to be compensated under the Jones Act. An exception for railroad employees was considered but dropped from the legislation prior to passage of the LHWCA in 1927. See *Nogueira v. New York, N.H. & H.R.R.*, 281 U.S. 128, 136 (1930). The deletion of a provision prior to the adoption of a statute "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

³ Respondent Goode argues that the exclusion of railroad workers from the District of Columbia Workers' Compensation Law should be construed to graft this exclusion onto all federal compensation acts. See Goode Brief on the Merits at 10 n.2. To paraphrase the *Nogueira* opinion, "the fact that a similar exception was left out of the Longshoremen's and Harbor Workers' Compensation Act and was inserted in the later statute works against, rather than for, [Goode's] contention." 281 U.S. at 138.

Nothing in the plain language of the original LHWCA or any of its amendments even hints at a "railroad worker" exception to the exclusive coverage of the Act. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). By contrast, the LHWCA amendments have added specific exceptions for certain categories of workers. See, e.g., 33 U.S.C. § 902(3) (1982) (exceptions for masters and members of crew of any vessel and persons engaged to load, unload, or repair small vessels); 33 U.S.C. § 902(3) (Supp. IV 1986) (additional exceptions for, *inter alia*, marina employees, restaurant employees, and clerks working exclusively in offices). Where Congress explicitly enumerates specific exceptions to coverage, "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 617 (1980).

Since the passage of the original Act in 1927 and also after the 1972 LHWCA amendment added the new "status" test set forth in Section 2(3), numerous judicial and administrative decisions have confirmed LHWCA coverage for railroad workers. See, e.g., *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334 (1953); *Nogueira v. New York, N.H. & H.R.R.*, 281 U.S. 128 (1930); *Vogelsang v. W. Maryland Ry.*, 670 F.2d 1347 (4th Cir. 1982) (LHWCA exclusive remedy for railroad employee injured while adjusting lids on railcars through which coal flowed since engaged in integral part of loading process); *Price v. Norfolk & W. Ry.*, 618 F.2d 1059 (4th Cir. 1980) (LHWCA exclusive remedy for railroad employee injured while painting

loading tower since engaged in maintaining equipment essential to loading process); *Harmon v. Baltimore & O.R.R.*, 560 F. Supp. 914 (1983) (LHWCA exclusive remedy for railroad employee injured while repairing coal loading equipment), *aff'd*, 741 F.2d 1398 (D.C. Cir. 1984); *Suppa v. Lehigh Valley R.R.*, 13 BEN. REV. BD. SERV. (MB) 374 (March 31, 1981) (railroad worker injured in loading process entitled to benefits under LHWCA). Presumably aware that railroad workers were consistently considered within the scope of the Act, Congress in 1984 again amended the LHWCA without any indication that this construction of the Act was contrary to its intent.⁴ When Congress amends a statute with a long history of consistent judicial and administrative interpretation, the retained portions of the act are presumed to incorporate that

⁴ In fact, in an effort to clarify the definition of "maritime employee" to exclude some peripheral workers not intended to receive LHWCA benefits, Congress provided an express exclusion for workers employed by transporters who "are temporarily doing business on the premises of [a maritime] employer . . . and [who] are not engaged in work normally performed by employees of that employer under this chapter." 33 U.S.C. § 902(3)(D) (Supp. IV 1986). The fact that Congress carved out an exception to coverage for transportation workers, but further limited the exception as quoted above, indicates that transportation workers who are regularly on the premises performing the normal work of their employer are intended to remain within the scope of the Act. It is significant that § 902(3)(D) is all that remains of a proposed exclusion for persons engaged in railcar or mechanical truck loading or unloading considered in connection with LHWCA Amendments proposed in 1981. See 127 Cong. Rec. 9829 (1981). The proposed 1981 exclusion was never reported out of the Committee. See S. Rep. No. 498, 97th Cong., 2d Sess. (1982).

interpretation. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Respondents Schwalb and McGlone protest that Congress failed to announce during the legislative process culminating in the 1972 LHWCA Amendment that the LHWCA was intended to pre-empt the FELA. See Schwalb/McGlone Brief on Merits at 8. Respondent Goode states that this omission from the legislative history of the 1972 and 1984 amendments "indicates that there was no intention to effect [sic] the rights of railroad workers such as Robert Goode."⁵ See Goode Brief on Merits at 8. But it is foolhardy to divine legislative intention from legislative omission: the judicial function is "to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry.*, 343 U.S. 562, 575 (1952).⁶

Respondents argue that the intent of Congress should be inferred from the failure of the railroad industry to testify at hearings on the LHWCA Amendment. See Schwalb/McGlone Brief on Merits at

⁵ Petitioners agree that Congress showed no intention to change the applicability of the LHWCA to railroad workers in either amendment: they were covered before and afterward.

⁶ As Rep. Miller proclaimed:

We meant what we said and we said what we meant. We do not want to see protracted court battles over the intent of Congress. If it isn't in the statute or clarified in the statement of the managers, it should be accorded little if any legislative intent.

130 Cong. Rec. 25,902 (1984) (remarks of Rep. Miller introducing Conference Report on S. 38, Longshoremens' and Harbor Workers' Compensation Act Amendments of 1984).

13; Goode Brief on Merits at 9. It is patently absurd to attribute an "intent" to a legislative body based on the failure of an industry segment to express an opinion on pending legislation. It is more likely that Congress interpreted the absence of "sophisticated and politically active employers, such as the railroads, and their equally sophisticated and active employee representatives"⁷ as the acquiescence of the industry in the accepted application of the Act to railroad employees.

Respondents also complain that the petitioners seek to deny Goode, Schwalb and McGlone their "traditional, superior remedy" under the FELA. See Schwalb/McGlone Brief on Merits at 16; Goode Brief on Merits at 7-8. But petitioners seek only to follow the statutory course charted by Congress: where railroad workers properly fall within the definition of maritime employees, the LHWCA provides their exclusive remedy. Further, while these three railroad workers might be willing to gamble on an eventual "superior" award at the conclusion of an FELA trial, any decision regarding the status of these respondents will affect other workers who might prefer the certainty and immediate benefits provided by the non-tort LHWCA compensation program. Particularly where the worksite injury does not result from employer negligence, the LHWCA no-fault remedy is superior to the FELA, which would provide no recovery.⁸

⁷ See Goode Brief on Merits at 9.

⁸ Philosophically, no-fault compensation programs are generally viewed as superior to liability acts, which consume in litigation funds that could be used for worker compensation. See Brief for

Finally, respondents contend that they should be excluded from LHWCA coverage because they are entitled to receive various benefits (retirement, unemployment, and health insurance for non-work sickness or injury) accruing specially to employees of interstate railway companies. See Schwalb/McGlone Brief on Merits at 14; Goode Brief on Merits at 4-5. Nowhere in the Act is there an exclusion from coverage for workers who have special additional retirement or disability benefits. These extraneous advantages, like union membership, are unrelated to the purpose of the Act and are simply irrelevant to the determination of respondents' status under the LHWCA. See *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 269 n.30 (1977).

In sum, while respondents would fall within the scope of the FELA absent the exclusivity provision of the LHWCA, their status as maritime workers requires their work-injury claims to be adjusted under the LHWCA. Respondents' theory that railroad em-

the United States as Amicus Curiae Supporting Petitioners at 23 n.28. The LHWCA has achieved its stated purpose of providing "an adequate, prompt, and equitable system of compensation." S. Rep. No. 1125, 92d Cong., 2d Sess. (1972). By contrast, there have been efforts to abolish the FELA and replace it with a compensation system almost since its inception. See 4 A. Larson, *Larson's Workmen's Compensation Law* § 91.74 (1989) (since 1912 FELA has provoked unfavorable comparison with state compensation acts). As recently as April 1989, the Senate Committee on Commerce, Science and Transportation considered an amendment to S. 462 (Amtrak Authorization Bill), 101st Cong., 1st Sess. (1989), that would have removed Amtrak from the FELA for three years. Senator Kasten, the sponsor of the amendment, has stated that he will offer the amendment for consideration by the entire Senate, even though the committee's tie vote (10 to 10) removed the FELA amendment from the reported bill.

ployees are excluded from LHWCA coverage is a "theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts the coverage of a remedial Act designed to extend coverage. . . ." *Northeast Marine Terminal*, 432 U.S. at 278.

II. The LHWCA Extends to All Workers Who Directly Further Longshoring Operations

Congress implemented the LHWCA to cover all workers (other than ships' crews) who are engaged in maritime employment, employed by a maritime employer, and injured at a maritime situs. The formula adopted in 1972 has been refined by judicial and administrative decisions and by amendment in 1984. Nevertheless, the pre-eminent concept of the Act is the compensation of injuries to those workers who regularly provide service to various maritime industries (loading, unloading, building, and repairing ships). In addition to the enumerated examples of maritime employees, 33 U.S.C. § 902(3) (the "status provision") specifically encompasses "harbor-workers" and any persons other than longshoremen who are "engaged in longshoring operations."⁹ This language, being undefined in the Act, must be presumed to bear its ordinary and accepted meaning. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). Full effect must be given to each word Congress used in defining the employees

⁹ This Court has already construed the word "including" in § 902(3) to "indicate that 'longshoring operations' comprise a part of the larger group of activities that make up 'maritime employment.'" *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77 n.7 (1979) (citing Webster's New Collegiate Dictionary).

entitled to LHWCA coverage so that the legislative purpose expressed by those words is not diminished or distorted. *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951).

The term "longshore" means "existing, occurring, employed, or working along the shore or waterfront"¹⁰ and "operation" means "a process or action that is part of a series in some work."¹¹ Thus, employees are "engaged in¹² longshoring operations" if they are participating in work occurring along the shore or waterfront. A narrower definition would circumscribe those employees working along the shore or waterfront who participate in the process that results in the movement of cargo to or from ships. With respect to the term "harbor worker," the Benefits Review Board has adopted the following definition for purposes of determining LHWCA status:

For future application of the "status" test, at least *those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities* (which include

¹⁰ Webster's *New World Dictionary of the American Language* (2d College ed.). A "longshoreman" is a "person who works on the waterfront loading and unloading ships." *Id.* Congress did not restrict coverage to "other persons performing the work of longshoremen."

¹¹ *Id.* This noun is also defined as "the act, process, or method of operating," leading back to the definition of the verb "to operate," which denotes bringing about or acting to produce an intended or desired effect. *Id.* A person who furthers longshoring, then, is a person who is engaged in longshoring operations.

¹² "Engaged in" connotes "being involved in" or "taking part in" an activity. *Id.*

docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships) will be deemed "harbor workers" within the meaning of Section 2(3) of the Act.

Stewart v. Brown & Root, Inc., 7 BEN. REV. BD. SERV. (MB) 356, 365 (Jan. 12, 1978) (emphasis supplied), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087 (4th Cir. 1979), *cert. denied*, 446 U.S. 1087 (1980). The record below shows that respondents Goode, Schwalb and McGlone were, by definition, harbor workers who were also engaged in longshoring operations, as contemplated by 33 U.S.C. § 902(3).

In determining the intended scope of the LHWCA status provision the crucial factor is the "nature of the activity to which a worker may be assigned." *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82 (1979). The lower courts found that these respondents were employed in jobs that are integrally related and essential to the coal-loading process, an undeniably maritime activity. Despite respondent Goode's self-serving characterization that he is a traditional railroad worker,¹³ his job assignment was pier machinist, a job the trial court found to be overwhelmingly devoted to "main-

¹³ Goode argues that the retarder he was repairing was identical to retarders used throughout all rail systems. This argument, first, ignores the uncontradicted evidence introduced at the hearing on jurisdiction that the retarders on the dumpers are unique in configuration and in operation. [JA: 145] Second, it disregards the crucial finding by Judge Waters that "the sole purpose of this retarder was to stop the loaded cars on the dumper to facilitate the transportation of coal from shore to vessel by dumping the coal on conveyor belts which feed the coal into the belly of docked vessels at pier 6." [JA: 35]

taining and repairing machines and equipment essential to the coal dumping operation." [JA: 36] Goode's own witnesses stated that pier machinists are regularly assigned to work on pier machinery over the water. [JA: 191, 195] Similarly, respondents Schwalb and McGlone portray themselves as typical railroad workers performing janitorial services.¹⁴ Yet the trial court found that Schwalb, who cleaned coal each shift from the machinery and conveyor belts in the loading towers and dumpers, was engaged in work "essential to the loading and unloading of coal by conveyor belt to the ships moored at the docks." [JA: 29] The trial court viewed McGlone's job of cleaning spilled coal from the loading towers and dumpers to be essential to the unimpeded flow of coal into ships. [JA: 31] The towers maintained by Schwalb and McGlone are located offshore on the pier. [JA: 94]¹⁵ The jobs to

¹⁴ Respondents Schwalb and McGlone contend that their janitorial duties place them within the exception of *Dravo Corp. v. Banks*, 567 F.2d 593 (3d Cir. 1977). *Dravo*, a pre-Pfeiffer case, supports LHWCA coverage if there is a "close functional nexus" between the job in question and maritime activity or if the worker's primary duties are a "necessary incident" of maritime activity. 567 F.2d at 595. Unlike *Banks*, whose primary job was cleaning up ordinary trash at an industrial plant, Schwalb and McGlone were retrieving cargo that had fallen from the conveyor belts so that the loading equipment would not jam. See JA: 29 and JA: 31 (unless stray coal removed, coal loading would stop). Their work has a close functional nexus to the coal-loading process and is a "necessary incident" of a decidedly maritime activity. Thus, Schwalb and McGlone are maritime workers under the *Dravo* rationale.

¹⁵ Contrary to respondents' contentions, petitioners do not ask the Court to find coverage simply on the basis of injury at a covered situs, see Schwalb/McGlone Brief on Merits at 11, nor to extend the covered situs back to the coal mines. See Goode

which respondents were regularly assigned and the tasks actually being performed at the time each was injured were predominantly and essentially maritime in nature. There is no principled basis for denying the applicability of the LHWCA to these employees.

To avoid the consequences of acknowledging the essential maritime nature of their work, respondents would rather focus on isolated aspects of their jobs, such as Schwalb's additional responsibility for sweeping the oil house or McGlone's additional work cleaning bunkhouses or Goode's very infrequent participation in putting hopper cars back on track in emergency derailments at the loaders or the fact that none of the respondents actually loaded or unloaded coal. The problem with focusing on these isolated details is that one quickly loses sight of the "nature of the activity" in general. Impaired by such analytical myopia, it would be possible to confuse Blundo, the checker, with a court clerk;¹⁶ or Caputo, the terminal laborer, with a supermarket shopper¹⁷ or a linetender with a cowboy.¹⁸ The fallacy in this analysis is that it disregards the critical component: the activity that is furthered by the work performed and that infuses the particular task with purpose. When the focus shifts back to the essential nature or purpose of their work, Blundo and Caputo regain their status of mar-

Brief on Merits at 18. As this Court has observed previously, § 3(a) provides the geographic limits of the Act's coverage. *Pfeiffer*, 444 U.S. at 78. These cases raise issues of status, not situs.

¹⁶ Both scrutinize groups of items for conformance to standards, mark them with identifying numbers, and then stack them in large metal boxes.

¹⁷ Both wheel cheeses in carts.

¹⁸ Both secure moving objects with looped ropes.

itime employees and respondents are correctly perceived as engaged in maritime activity furthering the loading of coal into ships.

Respondents' references to "traditional railroad work" and "traditional longshoring work" simply cloud the status issue and demonstrate the futility of expecting these outmoded concepts to solve today's jurisdictional issues. Under the standard proposed by Goode, "if a worker is not performing traditional longshoring work or is not involved in moving cargo between ship and land transportation, the worker is not covered by the LHWCA." Goode Brief on Merits at 19. *See id.* (contending Goode performing traditional railroad work, not traditional longshoring work). Respondents Schwalb and McGlone echo Goode in their contention that "LHWCA benefits should not be extended to those employees who are not actually involved in loading or unloading cargo between ship and land transportation or performing tasks traditionally performed by longshoremen." Schwalb/McGlone Brief on Merits at 11. *See id.* (Schwalb and McGlone not engaged in tasks traditionally performed by longshoremen). Yet, as this Court has acknowledged,¹⁹ the 1972 Amendment was inspired by the shift away from "traditional" longshoring operations due to the development of mechanized loading technology, such as LASH loading systems or petitioners' automated coal-loading systems. Neither the original Act nor its amendments premise LHWCA coverage on the performance of "traditional longshoring work"

¹⁹ *See Pfeiffer*, 444 U.S. at 74 (Congress expanded LHWCA coverage in 1972 in part due to changes in traditional longshore functions occasioned by advent of containerization).

and there is no basis to infer such a requirement from the legislative history.

Goode, Schwalb, and McGlone were pierside workers who were regularly assigned to repair and maintain shiploading equipment and structures used in or related to ship-loading. For more than a decade, such employees have been included under the LHWCA even if they never load or unload cargo and never work over navigable water. *See* Pet. Brief on Merits in No. 88-127, at 12-17 (discussing numerous federal and administrative decisions holding repair and maintenance workers to have status of maritime employees). Congress has never excluded from LHWCA coverage those harbor workers who repair or maintain loading and unloading equipment.²⁰ Congress restricted benefits for clerical employees who work exclusively in offices,²¹ but no similar restriction applies to repair and maintenance workers. Even if such a restriction can be imposed by analogy to exclude

²⁰ As the United States points out in its Brief in Support, the 97th Congress considered and deliberately rejected an exception for maintenance and repair workers. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at n.13 and accompanying text. The logical inference from this legislative decision is that Congress considered such employees to be correctly included in the LHWCA program and intended that such coverage continue. *See supra* note 2.

²¹ Section 902(3) was amended in 1984 to exclude from coverage "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work." The rationale for this exclusion was that these workers "are not intimately concerned with the movement and processing of ocean cargo and . . . are themselves confined, physically and by function, to the administrative areas of the employer's operations." 130 Cong. Rec. 25,903 (1984) (remarks of Rep. Miller).

from the LHWCA all maintenance workers who only clean office spaces and repair workers who only work in shops, these respondents would nevertheless remain within the Act: they are the Blundo's of the repair and maintenance trade.

Any decision to exclude Goode, Schwalb and McGlone from coverage will affect the status of, and therefore the benefits available to, a wide circle of other harbor workers who are ineligible for FELA benefits. The decision in these cases will either validate the application of the Act by the federal circuit courts and the Benefits Review Board to all workers who regularly repair and maintain maritime equipment or cast the majority of these workers back into the miasma of the divers state compensation acts. This result would be inconsistent with the overall intent of Congress to create an expanded and uniform system of coverage for all employees exposed to the same maritime hazards.

Respondent Goode, admitting that a "line must be drawn somewhere," has chosen the Belt Change (BC) House as the correct dividing point. "From this point on," Goode contends, "the machinery is clearly an integral part of the ship loading process." See Goode Brief on Merits at 18. The BC House, even as Goode describes it, is simply one interchange among many where the coal moves from one conveyor belt to another in its progress from the dumper to the ship.²²

²² Based on Goode's evidence at the hearing on jurisdiction, Judge Waters found that the loading process begins at least at the Barney Yard, which acts as a staging area for the coal delivered to Lanbert's Point. [JA: 35] In the coal-loading process, individual coal cars are moved one by one across the scales,

Even if there were some magic associated with the BC House meriting its designation as the LHWCA demarcation line, respondents would nevertheless be covered by the Act since they all regularly worked seaward of this point. But the major fallacy of Goode's contention is that it resurrects the "point of rest" rationale rejected by this Court in *Northeast Marine Terminal*, 432 U.S. at 278. If the BC House were to divide covered from non-covered employment, Goode, Schwalb and McGlone and all employees in their job categories would walk in and out of coverage during each shift. Selecting a jurisdictional gateway in the middle of the loading sequence would "revitalize the shifting and fortuitous coverage that Congress intended to eliminate." *Id.* at 274. This result is inimical to the intent of Congress and must be avoided.

CONCLUSION

Petitioners contend that their employees who regularly maintain or repair loading equipment on or near the piers are comprehended by the terms of § 902(3) and were intended by Congress to receive LHWCA benefits. The judgments of the Virginia Supreme Court are inconsistent with the language and the intended scope of the Act and are incompatible with rulings by federal and administrative judges on similar facts. Respondents Schwalb, McGlone and Goode are maritime employees whose injuries should be compensated under the LHWCA.

through the thaw sheds, and into the dumpers. The coal that is dumped from each car travels on the hopper feeder belt, to the A belt, the B belt, the C belt, the D belt, the E belt, and the F belt into the hold of the vessel. The Belt Change, or BC, House is "just a transfer point where the belt dumps from B belt onto C belt." [JA: 139]

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In the Supreme Court of the United States

OCTOBER TERM, 1988

CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE

NORFOLK AND WESTERN RAILWAY COMPANY, PETITIONER

v.

ROBERT T. GOODE, JR.

**ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA**

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONERS**

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8 AP

QUESTION PRESENTED

Whether "employee[s]" engaged in "maritime employment" under Section 2(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 902(3) (1982 & Supp. IV 1986), include not only those workers who actually load or unload cargo but also all workers on a covered site who perform work that is an essential element or integral part of the process of loading or unloading.



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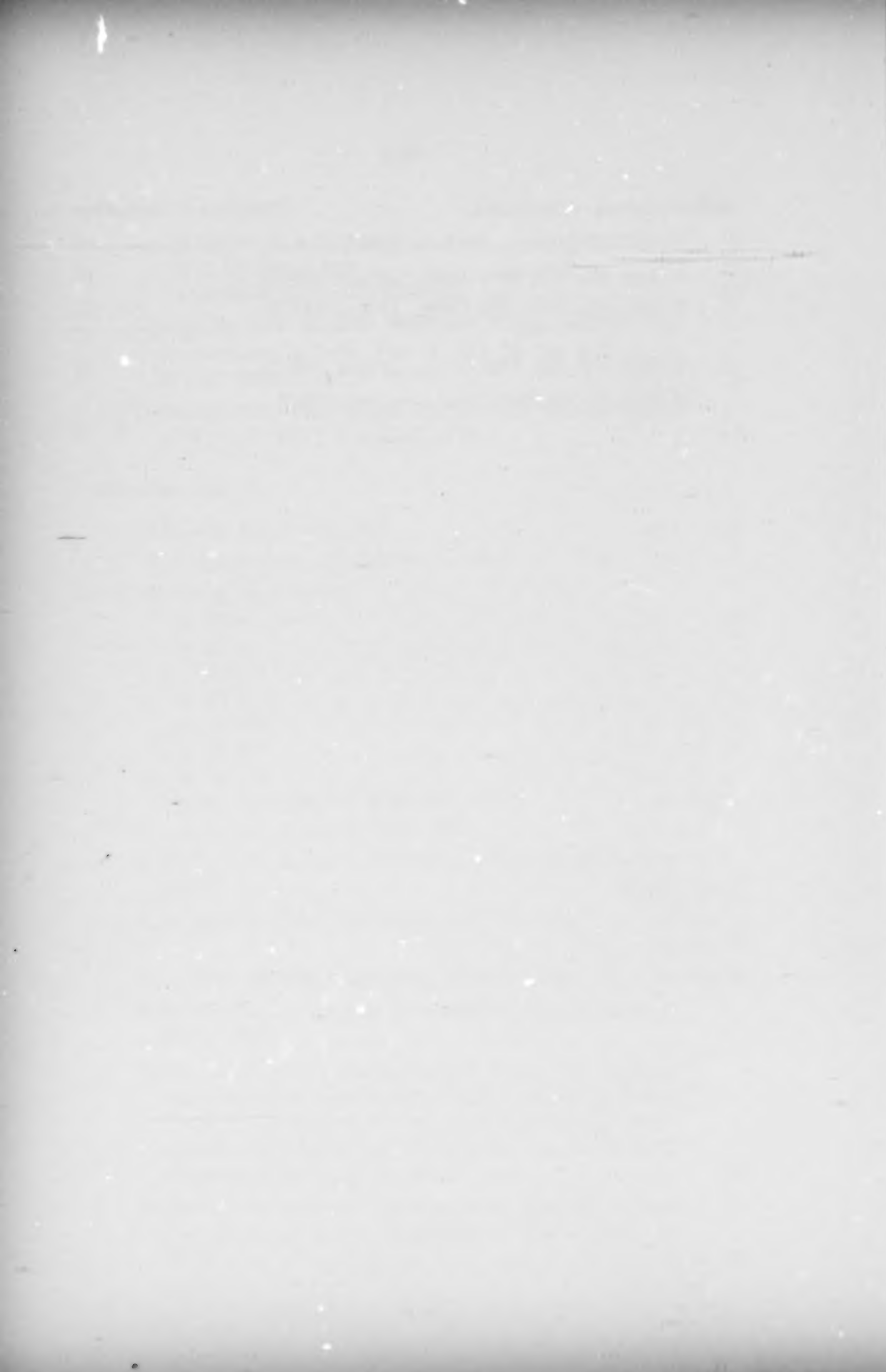
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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1979

CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE

No. 88-127

NORFOLK AND WESTERN RAILWAY COMPANY, PETITIONER

v.

ROBERT T. GOODE, JR.

*ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONERS**

INTEREST OF THE UNITED STATES

The Secretary of Labor, through the Department of Labor's Office of Workers' Compensation Programs (OWCP), administers the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*¹ The Director of the OWCP is a party to and may participate in any proceedings under the Act. These cases

¹ The Longshoremen's and Harbor Workers' Compensation Act was retitled by the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 27(d)(1), 98 Stat. 1654.

require the Court to determine the scope of the employee status requirement for coverage set forth in Section 2(3) of the LHWCA, 33 U.S.C. 902(3) (1982 & Supp. IV 1986). As indicated in our brief filed at the Court's invitation at the petition stage, resolution of the issue will affect federal policy concerning coverage provided by the Act and will implicate the Secretary's administration of the Act. The United States therefore has a substantial interest in this case.

STATEMENT

1. Petitioners, Chesapeake and Ohio Railway Company (C&O) and Norfolk and Western Railway Company (N&W), operate coal loading terminals in the Hampton Roads area of Virginia. C&O's terminal abuts the James River (87-1979 Pet. 7), while N&W's facility, known as Lambert's Point, adjoins the Elizabeth River (88-127 Pet. 7). Petitioners' freight trains transport coal mined inland for loading onto ships docked at the terminals' piers. Upon arrival, the coal-laden railway cars remain in the terminals' "barney" yards until the shiploading process begins. J.A. 35. The process of loading coal into ships' holds is highly mechanized and, in all material respects, identical at both petitioners' terminals. When shiploading begins, railway cars move one-by-one from the barney yards and onto "dumpers" at the land end of the piers. A mechanical device called a "retarder" stops each loaded coal car at the correct position on the dumper. Next, other mechanical devices lift and rotate the car, so that its contents drop through a hopper to conveyor belts that feed the coal directly onto the waiting ships. After unloading, the cars roll back to the terminals' holding yards, from which they are eventually sent inland. Barring mechanical failure or other incident, the coal loading process is con-

tinuous from the time a car leaves the barney yard until it returns, empty, to the holding yard. J.A. 21, 35; 87-1979 Pet. 7-9; 88-127 Pet. 8-9.

The respondents in No. 87-1979, Nancy J. Schwalb and William McGlone, were laborers employed by C&O to perform general cleaning at its terminal. Though each had varied duties, they both were frequently required, during the actual shiploading process, to clear away coal that spilled from the conveyor belts and the "trunnion rollers," the devices at the ends of the dumper that enable it to rotate suspended railway cars. Failure to clear away this "trash coal" results in malfunction of the shiploading equipment, thus halting the loading process. J.A. 21, 29, 30-31; 87-1979 Pet. 9. While Schwalb and McGlone easily could have replaced the trash coal on the conveyor belts, applicable union agreements prohibited them from doing so; rather, laborers from a different department performed that task. J.A. 21; 87-1979 Pet. 9-10; 87-1979 Br. in Opp. 5.

The respondent in No. 88-127, Robert J. Goode, Jr., was a machinist for N&W who worked in the Motive Power Department at Lambert's Point.² That department's function was to maintain and operate the coal facility, with machinists in the Department devoting the majority of their time to maintaining and repairing loading equipment and machines. J.A. 35-37.

Schwalb sustained a serious head injury on January 11, 1983, when she fell while walking to clear trash coal from the trunnion rollers. 87-1979 Pet. 10-11; 87-1979 Br. in Opp. 2. McGlone was injured on February 1, 1983, as he was attempting to clear away trash coal beneath a moving

² N&W employs machinists throughout its rail system, assigning them to different sites and different jobs on the basis of seniority. J.A. 35-36; 88-127 Br. in Opp. 5-6.

conveyor belt. 87-1979 Pet. 10; 87-1979 Br. in Opp. 3. Goode was injured on February 11, 1985, while repairing the retarder located on one of the dumpers at Lampert's Point. 88-127 Pet. 9-10; N&W Br. in Opp. 2-3. Each respondent brought a timely action under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, in the appropriate circuit court of Virginia. J.A. 20-21; N&W Br. in Opp. 2. C&O filed special pleas to the courts' jurisdiction, contending that the respondents' exclusive remedy was under the LHWCA, 33 U.S.C. 901 *et seq.* N&W moved to dismiss on the same basis. J.A. 28-29, 30, 34-35.³

2. The courts for the Third Judicial Circuit (*McGlone*), Fourth Judicial Circuit (*Goode*), and Seventh Judicial Circuit (*Schwalb*) of Virginia each decided that the LHWCA applied to respondents' claims, sustained petitioners' jurisdictional challenges, and dismissed the FELA actions. J.A. 40-42, 34-35. In each case, the court found no serious dispute that the respondents satisfied the LHWCA's "situs" requirement by working in a statutorily covered geographical area (J.A. 28-29, 31, 38-39), and thus focused principally on whether the respondents were "employee[s]" as defined by Section 2(3) of the Act, 33 U.S.C. 902(3) (1982 & Supp. IV 1986).

In resolving this issue of employee status, the circuit courts in the *McGlone* and *Goode* cases explicitly acknowledged a conflict between the restrictive approach to the question that the Virginia Supreme Court followed

³ FELA makes "common carrier[s] by railroad" liable in damages to their employees for work-related injuries occurring as a result of employer negligence, and confers concurrent jurisdiction over claims under the Act on state and federal courts. 45 U.S.C. 52, 56. As this Court long ago recognized, however, the LHWCA is the exclusive remedy for railroad workers who are injured while engaged in maritime employment. *Nogueira v. New York, N.H. & H.R.R.*, 281 U.S. 128, 136-138 (1930).

in *White v. Norfolk & W. Ry.*, 217 Va. 823, 232 S.E.2d 807, cert. denied, 434 U.S. 860 (1977), and the more expansive standard adopted by the federal courts of appeals in such decisions as *Price v. Norfolk & W. Ry.*, 618 F.2d 1059 (4th Cir. 1980). J.A. 31-33, 37-38. The courts viewed the Virginia Supreme Court's *White* standard as confining LHWCA coverage to only those workers on the situs who were "directly involved" in the loading of cargo. J.A. 31-32, 37-38. By contrast, the courts believed, the prevailing standard among the federal courts of appeals is considerably broader, encompassing all workers on the situs whose jobs comprise "an essential element in the loading and unloading of the vessels." J.A. 32, 38. As the *McGlone* court interpreted it, the federal standard does not require an employee to be involved "in the actual loading of ships," if the maintenance work the employee performed "was essential to the movement of maritime cargo." J.A. 32. The *McGlone* and *Goode* courts resolved this conflict between state and federal court interpretations against adherence to the Virginia Supreme Court's test; in their view, following *White* "would be to interpret a Federal law contrary to all of the decisions of the Federal courts" (J.A. 33), and the test formulated by the federal courts was, in fact, the proper test. J.A. 38.

Applying the federal courts' status test, the Virginia circuit courts concluded that the LHWCA covered the respondents because they performed tasks essential to the loading of coal at petitioners' terminals. *McGlone*'s cleaning duties were essential because the failure to clear away coal that had fallen from the belts "would eventually interfere with the loading operation and bring it to a halt." J.A. 31. Similarly, *Schwalb*'s cleaning duties conferred LHWCA coverage because "if the spilled coal was not removed * * * it could have halted [*sic*] the process of loading the coal aboard the vessels." J.A. 29. And *Goode*

was an employee under the LHWCA because he maintained and repaired equipment and machines "directly and solely related to the loading and unloading operation" (J.A. 37), and was thus "involved in the essential elements of loading and unloading" (J.A. 36-37, citing *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985)).⁴

3. The Supreme Court of Virginia consolidated Schwalb's and McGlone's appeals and reversed. J.A. 20-27. The court acknowledged that the United States Court of Appeals for the Fourth Circuit had applied the LHWCA to a painter who did not actually handle cargo but who had maintenance duties essential to the "entire [loading] process" (J.A. 24-25 (quoting *Price*, 618 F.2d at 1062 n.4)), and agreed here that the failure to remove "trash coal" could interrupt that process. J.A. 21. But the Virginia court rejected the *Price* court's reasoning and conclusion (J.A. 24-27), refused to adopt the "overall process" standard, and adhered instead to the restrictive test set out in *White*. J.A. 26-27. Under that test, the court held, workers must show that their "'own work and employment'" bears "'a realistically significant relationship' to 'traditional maritime activity involving navigation and commerce on navigable waters,'" to bring themselves within the LHWCA. J.A. 23-24, quoting *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976). Reading this Court's "essential elements of [loading or] unloading" language in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), to limit LHWCA coverage only to those employees

⁴ The circuit court in *Goode*, explicitly concluding that the federal standard should prevail over the State's *White* standard to the extent that the standards differed, held in the alternative that the activities of *Goode* qualified him for coverage under the *White* test as well. J.A. 37.

actually "engaged in the handling of cargo" (J.A. 25, quoting 432 U.S. at 267), the Virginia Supreme Court concluded that "the [*Northeast Marine Terminal*] 'essential elements' standard is more nearly akin to the [*White*] 'significant relationship' standard * * * than [to] the 'overall process' construction." J.A. 26. Without considering how essential their duties were to the overall loading process, the court held that since Schwalb and McGlone performed "purely housekeeping and janitorial tasks," they "were not statutory employees as defined in the LHWCA." *Ibid.* Application of the *White* test thus required reversal of the circuit courts' judgments. Subsequently, relying on its opinion in *Schwalb*, the Supreme Court of Virginia reversed the judgment in *Goode* as well. J.A. 46.³

SUMMARY OF ARGUMENT

1. The Supreme Court of Virginia erroneously construed Section 2(3), 33 U.S.C. 902(3), of the LHWCA to require that workers be directly involved in the physical process of loading or unloading cargo in order to qualify as employees under the Act. Congress defined "employee"

³ The Court did not consider, as an independent ground on which it could sustain the lower court's holding, the fact that Goode's duties as a pier mechanic at times involved work "over the water" (88-127 Br. in Opp. 6; J.A. 191, 195), and that such work therefore may have qualified Goode as a covered employee under *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273 (1977) (post-1972 LHWCA meant to cover "amphibious workers" or those who spent "at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity") and *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 311-312 (1983) (workers injured on navigable waters before 1972 were covered under LHWCA without regard to duties performed; post-1972 Act covers all who were previously covered).

to mean "any person engaged in maritime employment." The breadth of the statutory language suggests that courts should take an expansive view of the LHWCA's extended coverage, to include any worker who performs work that is an essential element or integral part of the cargo-handling process. Moreover, the remedial purposes of the 1972 amendments, which amended Section 2(3) to eliminate disparities in benefits due to the location of injuries and to adapt the Act's coverage to the realities of modern shipping practices, demand a liberal construction of the status requirement. The legislative history of the 1984 amendments to the LHWCA further confirms the propriety of reading the status provision broadly. These amendments specifically exclude from coverage certain narrow categories of employees whose connection to maritime employment is considerably more tenuous than that of respondents here. Even as to these exclusions, however, Congress precluded LHWCA coverage only if the workers involved were eligible for benefits under state workers' compensation schemes.

2. The state court's standard also conflicts with the principles of coverage enunciated by this Court and followed by the lower federal courts and the Benefits Review Board. This Court has explicitly admonished that the Act's status provision should be interpreted broadly and in functional terms, so that the Act achieves its objective of providing uniform coverage for those engaged in longshoring and related jobs. Thus, this Court has found coverage for an employee whose work was an integral part of the unloading process as altered by the advent of new technology, and for a terminal laborer who spent only some of his time in indisputably longshoring operations. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). Similarly, the Court has found coverage for two land-based workers who did not load or unload material

directly to or from ships, but who nonetheless were responsible for some portion of the loading and unloading activity and thus performed tasks that were an integral part of the overall process of loading or unloading cargo. *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979). In so doing, the Court has rejected distinctions in coverage on the basis of union labels, the "point of rest" theory, or similar restrictions created by employer assignment policies, because they would artificially curtail the functional analysis required by the Act.

Consistently with these decisions, the courts of appeals and the Benefits Review Board have uniformly viewed the question whether employees are engaged in "longshoring" and thus have status under the Act by focusing on the nexus between a worker's actual duties and the overall process of loading and unloading cargo. Employing this functional approach, the courts of appeals and the Board have extended LHWCA coverage to any employee on a covered situs who, like respondents, performs duties that comprise an "essential element" or "integral part" of the overall loading and unloading process, even if those duties do not themselves include physically or mechanically handling maritime cargo. The court below erred in rejecting this approach and in limiting the Act's coverage to only that considerably smaller class of employees who have a direct involvement with the physical process of loading and unloading cargo.

3. Finally, the state court's restrictive interpretation of landward coverage under the LHWCA conflicts with the Department of Labor's interpretation of the Section 2(3) status requirement, an interpretation the Department has consistently applied since 1972 in administering the LHWCA workers' compensation program. Because that interpretation is based on a permissible construction of the statute, it is entitled to deference and should be given effect.

ARGUMENT

"EMPLOYEES" ENGAGED IN "MARITIME EMPLOYMENT" INCLUDE ALL WORKERS ON A COVERED SITUATION WHO PERFORM WORK THAT IS AN ESSENTIAL ELEMENT OR INTEGRAL PART OF THE PROCESS OF LOADING OR UNLOADING

A. The Broad Language And The Legislative History Of The LHWCA's Status Provision Require An Expansive View Of The Act's Coverage

1. The language and legislative history of the 1972 amendments indicate that they provide broader coverage of land-based workers than that identified by the Supreme Court of Virginia. Congress amended the Act in an attempt to conclude a long saga of jurisdictional disputes over the coverage of the LHWCA.⁶ In particular, Con-

⁶ That saga, frequently revisited by this Court, began with this Court's determination in *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917), that a State was without power to extend workers' compensation to a worker injured on a gangplank between a wharf and a vessel lying in navigable waters. According to the Court, such state action threatened the "uniformity in respect to maritime matters" that the admiralty clause of the Constitution was meant to ensure (*id.* at 217); the Court consequently struck down two subsequent attempts by Congress to delegate the power to provide workers' compensation for maritime injuries to the States. See *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924). In response, Congress in 1927 enacted the LHWCA, which provided federal compensation to workers injured on the seaward side of the "Jensen line," but only "if recovery * * * [could] not validly be provided by State law." The Longshoremen's and Harbor Workers' Compensation Act of 1927, ch. 509, § 3, 44 Stat. 1426.

The work of hammering out the respective jurisdictions of the state and federal systems continued during the next four decades. By 1972, three jurisdictional spheres of coverage had emerged. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 719 (1980). Concurrent federal and state remedies were available for maritime injuries that were also of "local concern" (*Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 126

gress sought to expand the Act's scope; it wanted to remedy the coverage anomaly that limited longshore and harbor workers to recovering LHWCA benefits for work-related injuries sustained on navigable waters and left those who sustained similar injuries on the adjoining land without an LHWCA remedy.⁷ See S. Rep. No. 1125, 92d Cong., 2d Sess. 1, 12-13 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10-11 (1972); *Perini*, 459 U.S. at 306-312;

(1962)), while federal remedies alone were available for maritime injuries that were not "local" in character (*Jensen, supra*). Finally, workers injured landward of the *Jensen* line—beyond the water's edge—were consigned to the varying remedies provided by state workers' compensation laws. As to these workers, the Court explicitly invited the Congress to intervene once again, observing that "[t]here is much to be said for uniform treatment of longshoremen irrespective of whether they were performing their duties upon the navigable waters * * * or whether they were performing those same duties on a pier." *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 316 (1983) (describing the Court's statement in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 219 (1969)). In 1972, Congress responded to the invitation. See *Perini*, 459 U.S. at 316.

⁷ The amendments changed the Act in another major respect as well. As a quid pro quo for the expansion of coverage under the Act, Congress eliminated circumvention of the LHWCA compensation system through resort to an action for unseaworthiness. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 724 (1980); see S. Rep. No. 1125, 92d Cong., 2d Sess. 1-2, 5-12 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1-8 (1972); *Perini*, 459 U.S. at 313; *Northeast Marine Terminal*, 432 U.S. at 260-261. Prior to the 1972 amendments, a longshoreman or related worker could bring an unseaworthiness action against a ship owner for injury incurred on board the ship, and could do so even if the condition causing the injury had been the fault of the longshoreman or his or her employer. See, e.g., *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The shipowner could then recover the damages paid to the worker from that worker's employer under theories of express or implicit warranty of workmanlike performance. See, e.g., *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

Northeast Marine Terminal, 432 U.S. at 256-265; *Pfeiffer*, 444 U.S. at 72-73.

Congress effected the coverage change through two specific amendatory clauses. First, it modified the Act's "situs" requirement, expanding the definition of "navigable waters" under Section 3(a), 33 U.S.C. 903(a), to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." *Northeast Marine Terminal*, 432 U.S. at 263. Second, Congress added a new "status" requirement to Section 2(3), 33 U.S.C. 902(3), in order "to describe affirmatively the class of workers [it] desired to compensate." *Northeast Marine Terminal*, 432 U.S. at 264. Under the amended status test, LHWCA coverage extends to injured workers "engaged in maritime employment," including specifically "any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker." 33 U.S.C. 902(3).

Congress did not define "maritime employment," "longshoreman," or "longshoring operations" in either the Act or its legislative history. See *Northeast Marine Terminal*, 432 U.S. at 265.⁸ Nor is coverage limited in any

⁸ The Committee reports accompanying the Act posit only a single "typical example" of the new status requirement: workers unloading cargo from a ship or checking it as it is unloaded are to be covered, while those picking it up for transshipment inland, or performing "purely clerical" functions not directly involved with the loading or unloading process, are not to be covered. S. Rep. No. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 11 (1972); *Northeast Marine Terminal*, 432 U.S. at 266, 267. The example is useful in identifying the outer bounds of coverage, but it clearly "does not speak to all situations." *Id.* at 267.

case to the explicitly enumerated categories (like "longshoreman" and "ship repairman") that appear in the section. See S. Rep. No. 1125, *supra*, at 13; H.R. Rep. No. 1441, *supra*, at 10; *Perini*, 459 U.S. at 318 n.27. Rather, the broad language of the status test itself suggests that the courts should take "an expansive view of [its] extended coverage." *Northeast Marine Terminal*, 432 U.S. at 268.

The remedial purpose of the statute reflected in the legislative history further supports an expansive view of the Act's coverage. *Northeast Marine Terminal*, 432 U.S. at 268, citing *Voris v. Eikel*, 346 U.S. 328, 333 (1953). As chronicled by this Court (see 432 U.S. at 268-273), Congress decided to extend the coverage of the Act shoreward because of two main concerns. First, the fact that pre-1972 benefits under the LHWCA applied only to those workers injured over navigable waters led to a significant "disparity in benefits payable * * * for the same type of injury depending on which side of the water's edge and in which State the accident occurs." S. Rep. No. 1125, *supra*, at 12; H.R. Rep. No. 1441, *supra*, at 10. Moreover, the disparity between federal benefits and generally lower state benefits promised to widen after the passage of the federal benefit reforms contained in the 1972 amendments. S. Rep. No. 1125, *supra*, at 12-13; H.R. Rep. No. 1441, *supra*, at 10; *Pfeiffer*, 444 U.S. at 83; *Northeast Marine Terminal*, 432 U.S. at 262. Second, Congress recognized that the realities of modern shipping practices, including containerization and other technological innovations, had moved onto the land much of the longshoring work it wished to protect. S. Rep. No. 1125, *supra*, at 13; H.R. Rep. No. 1441, *supra*, at 10; *Northeast Marine Terminal*, 432 U.S. at 270.⁹

⁹ The magnitude of the change in the longshoring industry effected by containerization alone, and the difficulties that change engenders

These concerns support a construction of the Act's landward coverage that focuses on the occupations of those the Act seeks to protect rather than the "fortuitous circumstance" of where injuries occur (S. Rep. No. 1125, *supra*, at 13; H.R. Rep. No. 1441, *supra*, at 10; see *Pfeiffer*, 444 U.S. at 78-84; *Northeast Marine Terminal*, 432 U.S. at 272-273), and that makes allowance for changing technology (see *Northeast Marine Terminal*, 432 U.S. at 269-271). As this Court has articulated the functional approach of the status provision, all employees "involved in the essential elements of loading and unloading" meet the status requirement of the Act; employees are excluded only if they are " 'not engaged in the overall process of loading or unloading.' " *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985) (quoting *Northeast Marine Terminal*, 432 U.S. at 267 (emphasis added)). Coverage thus extends to any worker "responsible for some portion of" the loading and unloading activity since he or she is "as much an integral part of the process * * * as a person who participates in the entire process." *Pfeiffer*, 444 U.S. at 82-83.¹⁰

when it is necessary to identify "longshoring tasks," have been documented by this Court. See *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490 (1980) (concerning appropriate focus of work preservation agreement in longshoring industry under National Labor Relations Act).

¹⁰ The expansion effected by the 1972 amendments is particularly telling for purposes of this case because it targeted not only inadequate state compensation systems, but tort liability remedies as well. Congress made the decision to expand its federal workers' compensation system after giving "the most careful consideration" to a report prepared by the National Commission on State Workmen's Compensation Laws. H.R. Rep. No. 1441, *supra*, at 2; S. Rep. No. 1125, *supra*, at 2; see *Report of the National Commission on State Workmen's Compensation Laws*, (Washington D.C., July 31, 1972) [hereafter *Report on Comp. Laws*]. The report compared state com-

2. In 1984, Congress further amended the status provision.¹¹ Both the specifics of the change and the reasoning behind it confirm that the landward scope of the status provision should be defined broadly to include employees like respondents.

First, Congress addressed the status of certain limited categories of employees more tenuously connected to maritime work than those involved here, but who had been considered by the courts to be covered by the Act. Specifically, it removed from coverage "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work"; those working for a club, restaurant, museum, or other recreational or retail establishment; those employed by a marina (including "routine maintenance" workers, but not con-

pensation systems to those providing remedies through actions for negligence. It found that a modern workers' compensation system could provide broad coverage through liability without fault, substantial protection against interruption of income, and assured provision of medical services, while "[e]mployees excluded from coverage are forced to fall back on liability suits, a drawn-out, costly, and uncertain process that was dismissed long-ago as a means of dealing with occupational injuries and diseases." *Report on Comp. Laws* 35, 45; see generally *id.* at 25, 119-120. Thus, the Commission endorsed as an ultimate objective "universal mandatory coverage" of workers under compensation systems. *Id.* at 44. And, in order to further that goal, the Commission recommended, *inter alia*, "that the term 'employee' be defined as broadly as possible." *Id.* at 48. Congress, in turn, noted that "the provisions in [the 1972 amendments] are fully consistent with the recommendation of the National Commission * * * [and the bill] will provide an adequate, prompt, and equitable system of compensation." S. Rep. No. 1125, *supra*, at 2.

¹¹ The 1984 amendments and their history are directly relevant to the instant case involving respondent Goode, who was injured on February 11, 1985. 88-127 Br. in Opp. 7. They are also relevant to the cases involving respondents McGlone and Schwalb, insofar as they clarify the intent of the 1972 amendments. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381 (1969). See also note 14, *infra*.

struction or repair workers); and employees of vendors, suppliers, or transporters only temporarily on the premises of a maritime employer.¹² In fashioning these categories, Congress deliberately declined to remove employees engaged in "maintenance[] or repair of gear or equipment" from coverage of the Act: although the bill (S. 1182, 97th Cong., 1st Sess. (1981)) that became the basis for the 1984 amendment contained such an exclusion, the idea died in committee. Compare S. 1182 as introduced, 127 Cong. Rec. 9829 (1981), with S. Rep. No. 498, 97th Cong., 2d Sess. 2 (1982).¹³

Further, Congress made clear that even the exclusions it delineated "are intended to be narrowly construed." H.R. Rep. No. 570, 98th Cong., 1st Sess. 5 (1983). And, it provided that workers within the named categories are excluded *only* if they are eligible for state workers' compensation programs. 33 U.S.C. 902(3) (Supp. IV 1986).¹⁴

¹² Congress also exempted from the Act aquaculture workers and, for unrelated reasons, employees building, repairing, or dismantling small, recreational vessels. See H.R. Rep. No. 570, 98th Cong., 1st Sess. 6 (1983); S. Rep. No. 81, 98th Cong., 1st Sess. 26-28 (1983).

¹³ The proposed bill also contained an exclusion for "railcar loading and unloading." 127 Cong. Rec. 9829 (1981). The exclusion similarly did not leave committee. See S. Rep. No. 498, 97th Cong., 2d Sess. 2 (1982).

¹⁴ While emphasizing the limited nature of the new exclusions, Congress simultaneously was at pains to disclaim that its exclusions implied coverage (or noncoverage) for other groups. Although the Conference Report does not repeat the refrain, the Senate Report emphasizes that:

It is the committee's intention that these amendments not be interpreted to enlarge the present scope of the act's coverage. * * * [I]t is obvious that a large body of decisional law relative to traditional maritime employers and harbor workers remains undisturbed. [A] decision not to evaluate, endorse, or reject, explicitly or implicitly, the lower court and agency decisions in these

The reason Congress fashioned the specific exclusion it did in 1984 is also indicative of the scope of coverage under the Act. Congress sought "to reaffirm the purposes of the 1972 jurisdictional changes, and in that light * * * [to exclude] certain fairly identifiable employers and em-

other areas was made deliberately by the Committee in conjunction with the limited changes that are being made.

S. Rep. No. 81, 98th Cong., 1st Sess. 26 (1983); see also, e.g., 129 Cong. Rec. 16255 (1983) (remarks of Sen. Hatch); 130 Cong. Rec. 25,902 (1984) (remarks of Rep. Miller); 130 Cong. Rec. 8325 (1984) (explanation of House amendment).

While Congress's actions in 1984 must therefore be viewed with some caution, they indicate at the least that Congress considers the plain language of the status provision sufficiently broad to include those written out of the Act in 1984—because their exclusion from coverage under the status provision becomes effective only if those same workers are covered under state acts. In the words of the House Report, workers not protected by state programs would "remain under the coverage of the Longshore Act." H.R. Rep. No. 570, 98th Cong., 1st Sess. 5 (1983) (emphasis added); see also S. Rep. No. 81, *supra*, at 18; 130 Cong. Rec. 8324 (1984) (remarks of Rep. Erlenborn) (amendments "carve out" areas); *id.* at 8325 (explanation of House amendment) (legislation recognizes that employees "now covered" by Act may have duties with only attenuated relationship to maritime employment).

Moreover, it is relevant that Congress could reach "no political consensus" to disturb the judicial interpretation of the status provision that had developed by 1984. 130 Cong. Rec. S11,623 (daily ed. Sept. 20, 1984) (remarks of Sen. Hatch). If anything, Congress indicated its acceptance of "the limits of jurisdiction [that] ha[d] begun to emerge out of the judicial process." S. Rep. No. 81, *supra*, at 25; see also 130 Cong. Rec. S11,622 (daily ed. Sept. 20, 1984) (remarks of Sen. Hatch) (courts' interpretation of LHWCA in many instances "in keeping" with congressional intent although sometimes "clearly out of bounds"); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). By 1984, the courts of appeals had consistently interpreted the coverage of the LHWCA to include maintenance and repair workers who facilitated the loading process. See note 21, *infra* (citing cases).

ployees" who, although at work on a covered situs, lack "a sufficient nexus to maritime navigation and commerce." S. Rep. No. 81, 98th Cong., 1st Sess. 25 (1983). Specifically, Congress determined whether employees had "a sufficient nexus" to things maritime by looking to either "the nature of the work which they do, or the nature of the hazards to which they are exposed." H.R. Rep. No. 570, *supra*, at 4.¹⁵ In turn, it analyzed the "nature of the work" done in terms that confirm the broad, functional approach employed by the federal judiciary since 1972. See, e.g., S. Rep. No. 81, *supra*, at 30 (excluding employees temporarily on premises because their duties were "not an integral part" of traditional maritime employment); 130 Cong. Rec. 25,903 (1984) (remarks of Rep. Miller) (coverage focuses on "substance and purpose of the work being performed as integral to overall longshore operations"); cf. H.R. Rep. No. 570, *supra*, at 3-4 (employing functional approach). Congress's consideration of the "nature of the hazards" affecting workers additionally supports coverage of workers facilitating a loading process, because they are subject to the same harbor-side risks as those actually handling cargo.¹⁶ Cf. H.R. Rep. No. 570, *supra*, at 3 (noting that clericals confined to office work were ex-

¹⁵ See also H.R. Rep. No. 570, *supra*, at 3; 130 Cong. Rec. 8322 (1984) (remarks of Rep. Miller); 130 Cong. Rec. S11,622 (daily ed. Sept. 20, 1984) (remarks of Sen. Hatch); 130 Cong. Rec. 25,902 (1984) (remarks of Rep. Miller).

¹⁶ This Court's determination in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 425 (1985), that the hazards faced by an employee were relevant only to the situs inquiry, not to the status provision of the Act, was made on the basis of the language and history of the 1972 amendments alone, and in the context of an employee whose work was wholly unrelated to the loading and unloading process. See note 27, *infra*.

cluded from coverage, while those who perform clerical duties on piers or in warehouses were included).¹⁷

In short, both the language of the status provision and the purposes expressed by Congress in 1972 and 1984 support an expansive approach to the landward coverage of the LHWCA, rather than the restrictive standard applied by the Supreme Court of Virginia.

B. The State Court's Standard Conflicts With The Principles Of Coverage Enunciated By This Court And Followed By The Lower Federal Courts And The Benefits Review Board

1. In *Northeast Marine Terminal Co. v. Caputo*, *supra*, this Court first determined the reach of LHWCA coverage under the status provision of the 1972 amendments. The case involved two employees, a "checker" (the worker responsible for checking and recording cargo as it is loaded or unloaded) and a longshoreman who at the time of injury was working as a "terminal laborer" helping to load already-discharged cargo into consignees' trucks.

¹⁷ Congress also acted in 1984 for a simpler end: it sought to stem the litigation generated by the 1972 status provision. S. Rep. No. 81, *supra*, at 24-25. Several members of Congress indicated their belief that the litigation had been generated by the imprecision of the definition of covered employees. See, e.g., 130 Cong. Rec. 8335 (1984) (remarks of Rep. Boggs); 130 Cong. Rec. S11,622 (daily ed. Sept. 20, 1984) (remarks of Sen. Hatch). Another member indicated that the litigation had been caused by "the failure [of courts] to recognize that covered longshoring workers "have traditionally engaged in a full range of activities respecting the handling of ocean cargo" and had job tasks (including, for example, the use of computers) that reflected the advent of modern technology. See 130 Cong. Rec. 25,903 (1984) (remarks of Rep. Miller). In either case, Congress's purpose to minimize litigation must enter the calculus of the Act's interpretation. That purpose will be most effectively served by a bright line definition that clearly protects all activity on the waterfront that is "integral to overall longshore operations." *Ibid*.

After reviewing the history of the LHWCA with attention to Congress's continued efforts to provide uniform coverage to "amphibious" workers (432 U.S. at 257, 271), the Court concluded that the Act's status provision should be broadly interpreted. The Court held that the "checker" satisfied the status requirement because, although his longshoring tasks had been somewhat changed by technology (the employee was checking the contents of a container on shore on the day of the accident), his work was "an integral part of the unloading process as altered by the advent of containerization." *Id.* at 271. The Court held that the terminal laborer also met the status requirement; since he spent some of his time in "indisputably longshoring operations" (*id.* at 273), the Act's "focus on occupations and its desire for uniformity" supported continuous coverage under the LHWCA (*id.* at 276).

The court explicitly rejected restrictions that would have artificially curtailed its approach. First, it denied that union membership should determine eligibility as a "longshoreman" under the Act, noting that "[t]he vagaries of union jurisdiction are unrelated to the purposes of the Act." *Northeast Marine Terminal*, 432 U.S. at 268 n.30. Second, the Court rejected a limitation not unlike that adopted by the Virginia court here. The Court held that the "point of rest" doctrine—according to which "stevedoring" was limited to loading or unloading operations seaward of the first "point of rest" on a pier or dock from which cargo is moved into vessels or removed for further transport ashore—was incompatible with the Act's objective of extending uniform coverage on an occupational basis. *Id.* at 275, 276.

This Court confirmed its expansive interpretation of the landward extension of coverage in *P.C. Pfeiffer v. Ford*, *supra*, where it found coverage for two workers, neither of

whom loaded or unloaded material directly to or from ships.¹⁸ The Court rejected any resurrection of the artificial distinctions imposed by union labels or the point of rest theory (444 U.S. at 81-82) and also rejected the creation of similar restrictions by employer "assignment policies" (*id.* at 83). Rather, the Court focused on the "nature of the activity" to which a worker could be assigned: it noted that "[l]and-based workers who do not handle containerized cargo also may be engaged in loading, unloading, repairing, or building a vessel" because "[p]ersons moving cargo directly from ship to land transportation are engaged in maritime employment * * * [and one] responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." *Id.* at 80, 82-93 (citation omitted); see also *Herb's Welding*, 470 U.S. at 423, 425 (injured worker not an employee under Section 2(3) because "[h]is work had nothing to do with the loading or unloading process, nor [was] there any indication that he was even employed in the *maintenance of equipment used in such tasks*") (emphasis added).

Consistently with the rationale of these decisions, the courts of appeals and the Benefits Review Board¹⁹ uni-

¹⁸ Ford was a "warehouseman" injured while fastening military vehicles (which had been unloaded from a vessel days before) to a railroad flatcar. Under union rules, he was prohibited from moving cargo either directly from a vessel to a point of rest in storage or to a railroad car, or directly from shoreside point of rest onto a vessel. *Pfeiffer*, 444 U.S. at 71. Bryant was a "cotton header" injured while unloading cotton from its land transport by wagon into a pier warehouse. His loading activities were limited by union rules similar to those applied to Ford. *Id.* at 71-72.

¹⁹ The Benefits Review Board is charged under Section 21(b)(3) of the LHWCA, 33 U.S.C. 921(b)(3), with determining "appeals raising a substantial question of law or fact taken by any party in interest

formly view the question whether employees are engaged in "longshoring" by focusing on the nexus between a worker's actual duties and the overall process of loading and unloading cargo.²⁰ This approach takes into account the reality of conventional longshoring operations: maritime employment today is significantly affected by technology, job specialization, and the vagaries of union jurisdiction. Thus, although using slightly varying terms, the courts of appeals and the Board have extended coverage under the Act to any employee on a covered situs whose actual duties comprise an "essential element" or "integral part" of the overall loading and unloading process, even if those duties do not themselves including physically or mechanically loading or unloading maritime cargo. The standard applied by the courts of appeals,²¹ and by the

from decisions with respect to [benefit] claims of employees." Since the Board is not a policymaking agency, its interpretation of the LHWCA is not entitled to deference for that reason, see *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980), but the Board does serve as a specialized administrative appellate court in cases arising under the Act.

²⁰ The courts use the same approach in determining whether employees are "harbor-workers." See, e.g., *Newport News Shipbuilding & Drydock Co. v. Graham*, 573 F.2d 167 (4th Cir.), cert. denied, 439 U.S. 979 (1978).

²¹ See, e.g., *Harmon v. Baltimore & O.R.R.*, 741 F.2d 1398, 1404 (D.C. Cir. 1984) (railroad worker injured while repairing coal loading equipment is covered employee because his "functions were an integral part of the process of unloading and loading vessels and were vital to the movement of maritime cargo"); *Proterized New England Co. v. Miller*, 691 F.2d 45, 47 (1st Cir. 1982) (worker performing maintenance of shiploading equipment plays "integral part" in loading process); *Sea-Land Services, Inc. v. Director, OWCP*, 685 F.2d 1121, 1123 (9th Cir. 1982) (LHWCA applies to mechanic responsible for repairing equipment used to load cargo onto ships and move it within terminal area because "repair and maintenance of equipment

Board,²² specifically encompasses workers who, like re-

necessary to loading and unloading ships is integral to the process and is therefore 'maritime employment' "); *Hullinghorst Indus., Inc. v. Carroll*, 650 F.2d 750, 755-756 (5th Cir. 1981) (carpenter building scaffolding for repairs to loading pier engaged in "maritime employment," since "the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lies within the scope of 'maritime employment' " under the Act and such work is "an integral part * * *, an essential and indispensable step in the [pier] repairs to be effected"), cert. denied, 454 U.S. 1163 (1982); *Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 370 (7th Cir. 1981) (millwright responsible for maintenance and repair of shiploading equipment is employee under LHWCA, since these "functions are an integral part of the loading and unloading" process and "are directly connected with and are vital to the movement of maritime cargo"); *Prolerized New England Co. v. Benefits Review Bd.*, 637 F.2d 30, 37 (1st Cir. 1980) (coverage extends to employee whose duties include shortening scrap steel for shipment because "[v]iewed in terms of this functional analysis * * * [the claimant's] repair, maintenance and occasional operation of the varied elements of Prolerized's integrated loading system qualify as peculiarly maritime services"), cert. denied, 452 U.S. 938 (1981); *Price v. Norfolk & W. Ry.*, 618 F.2d 1059, 1061 (4th Cir. 1980) (railroad worker injured while painting "gallery" used for loading grain into ships falls within LHWCA's ambit because "[t]he gallery, and its maintenance, are essential to the loading and unloading of all vessels"); see also 4 A. Larson, *Larson's Workmen's Compensation Law* §§ 89.45(b), 89.45(e), 89.45(f), 89.49 (1989) (citing cases).

²² See, e.g., *Powell v. International Transp. Services*, 18 Ben. Rev. Bd. Serv. (MB) 82, 84 (1986) ("vessel planning and stowage coordinator" is employee under the LHWCA because his "duties planning the loading and unloading of cargo," though clerical, "are integral to the longshoring process and as such are peculiarly maritime"); *Wuellet v. Scappoose Sand & Gravel Co.*, 18 Ben. Rev. Bd. Serv. (MB) 108, 110-111 (1986) (welder/mechanic injured while repairing conveyor belt at barge loading facility is covered under LHWCA since "the repair of equipment at employer's barge facility is an integral part of the loading process * * * and therefore is a maritime activity"); *Verderane v. Jacksonville Shipyards, Inc.*, 20 Ben. Rev. Bd. Serv.

spondents, engage in cleaning, maintenance, and repair of equipment used to load ships.²³

2. In holding that respondents were not employees under the LHWCA, the Supreme Court of Virginia expressly rejected the courts of appeals' functional test and adhered, instead, to its earlier decision in *White v. Norfolk & W. Ry.*, *supra*. J.A. 26-27. *White* limited coverage under the Act to those employees having a " 'realistically significant relationship' to 'traditional maritime activity involving navigation and commerce on navigable waters.' " 217 Va. at 832, 232 S.E.2d at 812 (quoting *Weyerhaeuser Co. v.*

(MB) 62, 64 (1984) (manager of shipyard's Medical, Safety and Security Department, whose duties required inspecting certain shipbuilding equipment and assuring compliance with safety regulations, was covered employee since he "performed an integral role in assuring" shipyard workers' safety and his duties "were important to the overall progress of maritime construction"); *Bennett v. Mason Terminals, Inc.*, 14 Ben. Rev. Bd. Serv. (MB) 526, 528-529 (1981) (workers refurbishing containers satisfy LHWCA's status requirement as their "work [is] essential to the continued use of containers and thus is integral to longshoring operations"; benefits precluded here, however, because workers were not employed on a covered situs); *De Robertis v. Oceanic Container Serv., Inc.*, 14 Ben. Rev. Bd. Serv. (MB) 284, 287-288 (1981) (container repairmen, even if "not personally involved in loading and unloading cargo from ships" are nonetheless covered employees under the LHWCA, because "they maintained and repaired equipment used in longshoring operations" and "[t]heir work was an 'integral part' of, or 'necessary ingredient' in, longshoring operations," citing *Cabezas v. Oceanic Container Serv., Inc.*, 11 Ben. Rev. Bd. Serv. (MB) 279, 285-286 (1979)); see also 4 A. Larson, *supra*, §§ 89.45(b), 89.45(e), 89.45(f), 89.49 (citing cases).

²³ The treatise writers agree that an expansive approach to coverage under the Act is appropriate. See 1 M. Norris, *The Law of Maritime Personal Injuries* 3rd 128 (Supp. 1988); 4 A. Larson, *supra*, § 89.42(a), at 16-261 (rejecting, in discussion concerning "point of rest" theory, semantic distinctions excluding from coverage worker "whose entire function is associated with the movement of goods within the terminal").

Gilmore, 528 F.2d at 961).²⁴ The *White* decision makes clear that the Supreme Court of Virginia views the "realistically significant relationship" test as requiring direct involvement in the physical process of loading and unloading cargo. Thus, although White's duties required him to maintain electrical equipment essential to the coal loading process, the court concluded that he lacked the requisite relationship to the loading of cargo, because he was "not actually handling any cargo, either manually or mechanically," and "was not manipulating * * * any of the controls of the electrical mechanism, which furnished the power for this automated loading process." 217 Va. at 832-833, 232 S.E.2d at 813. Applying *White*, the court concluded here that respondents Schwalb and McGlone were not statutory employees because they also were not actually " 'engaged in the handling of cargo' " (J.A. 25), notwithstanding that failure to clean trash coal from the rollers and belts would halt the loading process (J.A. 21) and that only the "vagaries of union jurisdiction"—specifically, union agreements covering various groups of workers at the terminal—prohibited Schwalb and McGlone from placing the coal back on the belts (*ibid.*).²⁵ The court applied its narrow approach again when it ruled

²⁴ The Supreme Court of Virginia's continued reliance on *Weyerhaeuser Co. v. Gilmore* is misplaced. The Ninth Circuit has made it clear that it reads *Weyerhaeuser's* "realistically significant relationship" language to mean that "repair and maintenance of equipment necessary to loading and unloading ships is integral to the process and is therefore 'maritime employment' covered by the Act." *Sea-Land Service, Inc.*, 685 F.2d at 1123. Thus, the Ninth Circuit applies its *Weyerhaeuser* formulation in harmony with authority in the other federal circuits.

²⁵ But for the union contracts that prohibited them from placing the trash coal that they had cleared away back on the conveyor belts, Schwalb and McGlone indubitably would have done so.

that respondent Goode was not an employee under the Act, although Goode's duties consisted largely of maintenance and repair of machinery and equipment used exclusively for coal loading in a terminal where loading apparently is almost entirely automated (see J.A. 35).²⁶

The Supreme Court of Virginia's apparent conclusion that *Northeast Marine Terminal* and *Pfeiffer* established the outer limits of coverage is inappropriate. As this Court

²⁶ Goode makes an unpersuasive argument that the state court's exclusion of him from LHWCA coverage is not at odds with the overwhelming weight of federal case law because, until the "unloading process had been completed, the coal was still in land transportation and was not in the process of being loaded aboard a ship." 88-127 Br. in Opp. 20-21. The circuit court specifically found that "the process of loading the coal in'o vessels begins" once the rail cars leave the barney yard (J.A. 35), and Goode has not even suggested that this finding should be set aside. Additionally, although the decision of the Fourth Circuit in *Conti v. Norfolk & W. Ry.*, 566 F.2d 890 (1977) (brakemen injured at Lambert's Point were not employees under the LHWCA) supports Goode's argument, we agree with the observation of the Court of Appeals for the District of Columbia Circuit that the Fourth Circuit has "moved away from using the distinction between 'traditional railroading tasks' and 'traditional maritime tasks' as the sole inquiry, or the dispositive issue in LHWCA cases." *Harmon*, 741 F.2d at 1304 (citing *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037, 1050 (4th Cir. 1980) (*Conti* cited only for "integral part" language); *Price*, *supra* (drawing no *Conti*-like distinction between "traditional railroading" as opposed to "traditional maritime" tasks), and *Vogelsang v. Western Maryland Ry.*, 670 F.2d 1347, 1348 (4th Cir. 1982) (distinguishing *Conti*)). This and other courts have, of course, found railroad workers covered by the LHWCA despite the parallel coverage of the FELA. See, e.g., *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334 (1953); *Harmon*, *supra*; *Vogelsang*, *supra*; *Price*, *supra*; cf. *Powell v. Cargill, Inc.*, 444 U.S. 987 (1979) (vacating and remanding for reconsideration in light of *Pfeiffer*, *supra*, lower court's exclusion from coverage of employee whose "work was more oriented to the rails than to the sea" (573 F.2d 561, 564 (1978), withdrawn after remand, 625 F.2d 330 (9th Cir. 1980)). In such circumstances LHWCA coverage is exclusive under 33 U.S.C. 905.

has noted, the claimants in those cases were " 'engaged in longshoring operations,' " and the Court "had no occasion * * * to determine other possible applications of the status test to activities performed on the expanded landward situs." *Perini*, 459 U.S. at 318 n.27. Thus, the Virginia court read the "essential elements" and "overall processes" language in *Northeast Marine Terminal* and *Pfeiffer* in far too cramped a manner (J.A. 25-26), giving no effect to the directive in those cases that the Act's coverage be viewed expansively, and making no accommodation for the impact of modern technology on cargo handling techniques, for the high degree of job specialization, or for the extent of unionization within the longshore industry.²⁷

Nor is the line drawn by the Virginia court rendered more palatable by the fact that it may, in some circumstances, relegate employees to a tort, rather than a state workers' compensation remedy. Congress deliberately chose to extend federal workers' compensation because of the advantages specific to that system. See note 10, *supra*; S. Rep. No. 1125, *supra*, at 2 (noting necessity for compensation system to ensure employer responsibility for unsafe conditions in high-risk industry, and consistency of 1972 amendments with recommendations by National Commission on State Workmen's Compensation); H.R. Rep. No. 1441, *supra*, at 2-3 (similar); see also *Nogueira*,

²⁷ To the extent that the state court relied on *Herb's Welding, Inc. v. Gray*, *supra*, its reliance is misplaced. See J.A. 26. The employment at issue in that case—off-shore drilling—was not maritime, and the claimant, a welder on an oil rig, had "nothing to do with the loading or unloading process" and was not "even employed in the maintenance of equipment used in such tasks." 470 U.S. at 425. By contrast, petitioners' terminal operations are uncontestably maritime in nature, and the respondents plainly were "employed in the maintenance of equipment used to [load and unload cargo]."

281 U.S. at 136 (Congress that enacted LHWCA "distinctly recognized" the importance of the policy of compensation acts, and their advantages in providing for appropriate compensation in the case of injury or death of employees without regard to the fault of the employer"); *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334, 337 (1953) (LHWCA chosen as compensation act instead of employers' liability statute so as to bring admiralty law into harmony "with modern concepts of the duty of an employer although without fault to carry the burden of industrial accidents").²⁴

²⁴ The advantages offered by a workers' compensation system, as opposed to a system of tort liability such as the FELA, have repeatedly been recognized by this Court and by others. See, e.g., *Parker v. Motor Boat Sales*, 314 U.S. 244, 249 (1941) (discussing congressional purpose to extend "modern principle of compensation" by enacting LHWCA) (quoting S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926)); *Urie v. Thompson*, 337 U.S. 163, 196-197 (1949) (Frankfurter, J., concurring in part) (describing concept of negligence as "antiquated and uncivilized basis for working out rights and duties for disabilities and deaths inevitably due to the conduct of modern industry"); *Wilkerson v. McCarthy*, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring) (describing concept of negligence in FELA cases as an "outmoded . . . working principle for the adjustments of injuries inevitable under the technological circumstances of modern industry," and as a "cruel and wasteful mode" of dealing with injuries that has "long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws"); cf. *Calbeck*, 370 U.S. at 121-122 (noting, while reviewing disadvantages of jurisdictional confusion in LHWCA cases, that Act's framers meant "to assure the existence of a compensation remedy for every . . . injury, without leaving employees at the mercy of the uncertainty, expense, and delay of fighting out [results] in litigation").

Larson notes in his treatise that the FELA, while considered a great step forward as a method of handling work injuries in 1908, had, by 1912, already begun to receive unfavorable comparison with non-fault compensation acts beginning to appear in the States. See 4 A. Larson,

C. The Department Of Labor's View On The Scope of LHWCA Coverage Is Entitled To Deference

The Supreme Court of Virginia's restrictive construction of landward coverage under the LHWCA also conflicts with the expansive interpretation of the Section 2(3) status requirement that the Department of Labor has consistently applied since 1972 in administering the LHWCA workers' compensation program. Under the Department's interpretation, respondents would be considered employees under Section 2(3) because their work was directly related to the equipment used to load cargo. See Office of Workers' Compensation Programs, Employment Standards Admin., U.S. Dep't of Labor, *LHWCA Program Memorandum No. 58, Guidelines for Determination of Coverage of Claims Under Amended Longshoremen's Act 8-9* (Aug. 10, 1977) ("Longshoring operations may be regarded as all operations necessary to the transfer of cargo between land and water modes of transportation which are performed by workers associated with that transfer rather than with the transportation itself. The test is essentially quite simple: was the injured worker employed in the waterfront cargo-handling industry, in work directly related to the cargo or to the equipment or premises used to handle it? If so, the worker had 'employee' status under § 2(3)."); *Northeast Marine Terminal*, 432 U.S. at 272 (Director's view is that "[m]aritime

supra, § 91.74, at 16-481; see also *id.* at § 91.76 (observing that the debate about the continued vitality of the FELA generally assumes that the negligence principle is an "anachronism" in the handling of workplace injuries, but continues because of failure of non-fault systems to meet objectives); *Report on Comp. Laws* 25, 45, 119-120 (criticizing tort liability suits as method of workers' compensation because determination of negligence by litigation expensive, leaves some workers without protection for injury, crowds court dockets, delays payment, and may deter successful rehabilitation).

employment * * * include[s] all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation'").

The Department's interpretation of the Section 2(3) status requirement is "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Thus, it is entitled to deference and should be given effect.²⁹

CONCLUSION

The judgments of the Supreme Court of Virginia should be reversed.

Respectfully submitted.

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APRIL 1989

²⁹ See, e.g., *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 635 (1983) (consistent practice of those charged with enforcement and interpretation of LHWCA entitled to deference); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (great deference due interpretation of officers or agency administering statute); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) (construction of statute by those charged with executing it should be followed "unless there are compelling indications that it is wrong").



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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE,
Respondents.

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

ROBERT T. GOODE, JR.,
Respondent.

On Writs of Certiorari
To The Supreme Court of Virginia

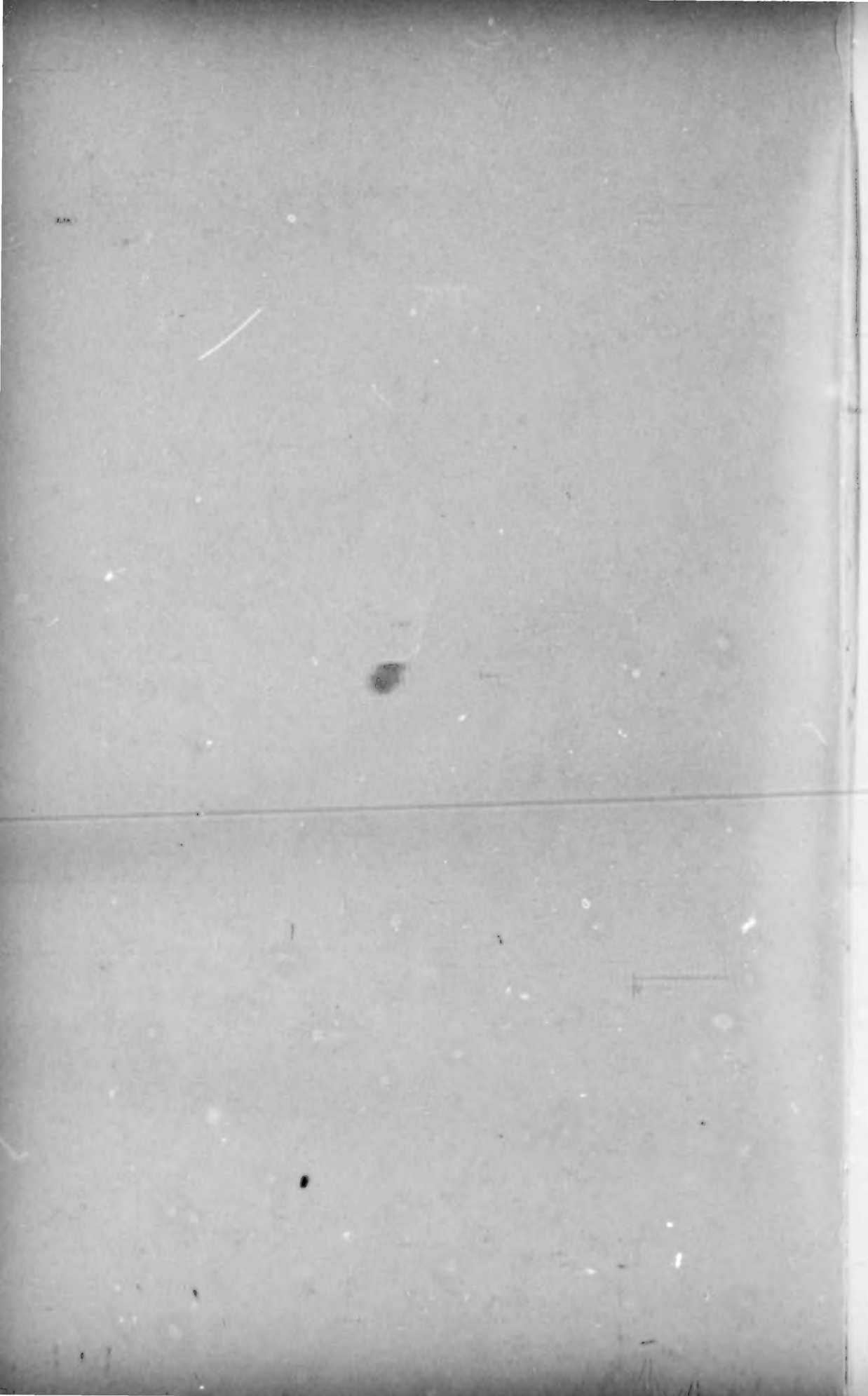
MOTION FOR LEAVE TO FILE AN AMICI CURIAE
BRIEF AND BRIEF OF ASSOCIATION OF AMERICAN
RAILROADS AND NATIONAL ASSOCIATION OF
RAILROAD TRIAL COUNSEL AS AMICI CURIAE
IN SUPPORT OF PETITIONERS

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April 21, 1989



IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

Nos. 87-1979 and 88-127

CHESAPEAKE AND OHIO RAILWAY COMPANY,
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**MOTION OF ASSOCIATION OF AMERICAN RAILROADS
AND NATIONAL ASSOCIATION OF RAILROAD TRIAL
COUNSEL FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE**

Pursuant to Rule 42 of the Rules of this Court, the Association of American Railroads and the National Association of Railroad Trial Counsel respectfully move for leave to file the attached *amici curiae* brief in these consolidated cases. Petitioner and respondents in No. 87-1979 have consented to the filing of this brief. Petitioner in No. 88-127 has likewise consented to its filing, but respondent therein indicated only that he will have no objection to this motion.

The decision of the Virginia Supreme Court below, in cases brought under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, reversed judgments of the state trial courts, which had dismissed the cases on the basis that their claims were subject to the exclusive jurisdiction of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.*), since respondents' duties involved maintenance and repair of structures and machinery utilized in loading bulk coal onto ships in navigable waters. As previously developed herein in the petitions for writs of *certiorari*, as well as the *amici curiae* briefs filed by these movants and the Solicitor General on behalf of the United States (which was filed at the request of this Court), the decision below is in direct conflict with the decisions of all six federal circuits which have considered the question, including the Fourth Circuit.

Mindful of considerations of nationwide uniformity as to the coverage of the LHWCA, as well as issues of federal supremacy (due to the fact that different results ensue, depending on whether a case is filed in state or federal court), these *amici curiae* submit that such coverage questions are susceptible to uniform resolution by application of a standard of "collective non-performance" of the particular duties of the injured worker as they relate to the ship-loading/unloading process. Such an approach was successfully utilized by this Court in resolving similar coverage questions which arose under the 1939 Amendments to the FELA, which expanded that Act's coverage for reasons much like those which prompted the expansion of coverage in the 1972 Amendments to the LHWCA.

The members of the Association of American Railroads constitute the vast majority of the nation's railroads which are sued under the FELA or the LHWCA, and have a direct interest in maintaining nationwide uniformity in decisions as to the scope of the exclusive coverage of the LHWCA, in order to properly determine under which of the Acts their injured employees must make claims for work-related injuries. The Members of the National Association of Railroad Trial Counsel, who are attorneys representing the various railroads, have a direct interest in the substantive law, strategy and tactics in cases brought under either Act, and have a direct interest in nationwide uniformity so as to enable them to adequately advise their railroad clients as to the proper handling of cases, depending upon which of the Acts is involved.¹

Quite properly, the petitions herein were limited to arguing the propriety of the decision below, and did not undertake to develop a basis for the resolution of future cases which will involve other facts, or will involve future technological advances in ship-loading. These *amici curiae* believe the "collective non-performance" standard advanced in the attached Brief will be of assistance to the Court, not only in its resolution of the issues in these consolidated cases, but in developing a simple, objective and uniform standard of coverage of the LHWCA.

¹ The marked disparity in procedures under the two Acts is discussed in Section III of the Brief Of Association Of American Railroads and National Association Of Railroad Trial Counsel As *Amici Curiae* In Support Of Petition in No. 87-1979, filed July 5, 1988.

Accordingly, the Association of American Railroads and National Association of Railroad Trial Counsel respectfully request leave to present their views herein.

Respectfully submitted,

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April 21, 1989

QUESTION PRESENTED

Whether, in determining if a worker qualifies as an "employee" engaged in maritime employment within the meaning of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, the congressional intent for a "simple uniform standard of coverage" under the Act would be best achieved by an analysis as to whether the collective non-performance of his duties would slow, stop, or lessen the safety or efficiency of the ship-loading/unloading process?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

Nos. 87-1979 and 88-127

CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

v.

NANCY J. SCHWALB AND WILLIAM MCGLONE,
Respondents.

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

ROBERT T. GOODE, JR.,
Respondent.

**On Writs of Certiorari
To The Supreme Court of Virginia**

**BRIEF OF ASSOCIATION OF AMERICAN RAILROADS
AND NATIONAL ASSOCIATION OF RAILROAD TRIAL
COUNSEL AS AMICI CURIAE
IN SUPPORT OF PETITIONERS**

STATEMENT OF INTEREST OF AMICI CURIAE

The Association of American Railroads is a voluntary, unincorporated, non-profit trade organization,

headquartered in Washington, D.C. Its members constitute the vast majority of the nation's railroads. They operate approximately 85 percent of the line-haul mileage, produce approximately 93 percent of the freight revenues and employ approximately 90 percent of the railway work force in the United States, having in the aggregate nearly 250,000 employees who, if injured, are subject to the provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* (hereinafter "FELA"), unless their injuries are compensable under the Federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (hereinafter "LHWCA"). The interest of the Association is to maintain nationwide uniformity in the determination as to which Act applies to those railroad employees injured while performing duties in connection with the loading and unloading of vessels.

The National Association of Railroad Trial Counsel is a voluntary, unincorporated non-profit organization, headquartered in Los Angeles, California. Its membership consists of more than 1,200 trial lawyers who represent all of the significant railroads operating throughout the United States. One of its principal objectives is to furnish railroad counsel with a forum for the study of legal problems associated with railroad personal injury cases, including those filed by employees under the FELA and the LHWCA, with particular interest in the substantive law and the strategy and tactics to be utilized therein. Another of its objectives is to enable its members to advise their railroad clients as to the proper handling of such injury cases depending upon which of the Acts is involved.

STATEMENT OF THE CASE

In these consolidated cases, the decision of the Virginia Supreme Court below in No. 87-1979 has been subsequently reported at 235 Va. 27, 365 S.E.2d 742 (1988). In No. 88-127, the Virginia court below later entered judgment based on the above decision. This brief, for ease of reference, will refer to the cases collectively as the decision below.

SUMMARY OF ARGUMENT

Notwithstanding the fact that the FELA expressly covers all claims by interstate railroad employees for work-related injury, if a claim is cognizable under the LHWCA, it *must* be filed under that later-enacted statute since that Act's coverage is "exclusive."¹

The decision below by Virginia's highest court concerning the LHWCA's "status" requirement² is in obvious conflict with all of the many federal circuit decisions, thus defeating the congressional intent that "a simple, uniform standard of coverage" be applied.³ This conflict is due to Virginia's view that longshore "status" can be achieved only if the employee actually

¹ 33 U.S.C. § 905; see *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, *reh. denied*, 345 U.S. 913 (1953); *Nogueira v. New York, N.H. & H. R. Co.*, 281 U.S. 128 (1930).

² Congress expanded the coverage of the LHWCA in 1972 through the adoption of a "situs-status" approach, as extensively discussed in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). The decision below recognizes that the "situs" requirement has been met, as it is clear that mechanized coal loading facilities of the type involved herein constitute a part of an "adjoining pier, wharf, . . . or other adjoining area customarily used . . . in loading . . . a vessel." 33 U.S.C. § 903 (a).

³ *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 83 (1979).

is "engaged in the handling of cargo", notwithstanding its recognition that respondents' failure to perform their duties would interrupt the ship-loading process.⁴ The federal decisions, on the other hand, while using slightly different analyses, hold that the "status" requirement is satisfied where the employee's duties constitute a necessary or integral part of the loading process.

Amici curiae believe that this conflict can be resolved by adoption of a "collective non-performance" standard to determine whether the LHWCA's "status" requirement is met in individual cases: if non-performance of the work allocated to the employee and all others having the same duties would stop, slow, or lessen the safety or efficiency of the ship-loading/unloading process, the worker would be deemed an "employee" engaged in "maritime employment." This Court successfully utilized a similar standard in resolving coverage questions under the 1939 Amendments to the FELA, the coverage of which was expanded for much the same reasons which prompted the expansion of coverage accomplished by the 1972 Amendments to the LHWCA.

ARGUMENT

I. THE APPROACHES UTILIZED IN THE FEDERAL LHWCA DECISIONS, REJECTED BY THE COURT BELOW, ARE CONSISTENT WITH THE ACT AND ARE SIMILAR TO THE APPROACH UTILIZED BY THIS COURT IN CONNECTION WITH THE EXPANDED COVERAGE OF THE FELA

This Court has discussed the broad language of the 1972 LHWCA Amendments and accorded "an expan-

⁴ *Schwalb v. C. & O. Ry. Co.*, 365 S.E.2d 742, 743 (Va. 1988).

sive view of the extended coverage" thereof. *North-east Marine Terminal Co. v. Caputo*, 432 U.S. at 268. The various federal circuits, in line with this Court's liberal construction of the "status" requirement of the LHWCA, hold that workers who maintain or repair equipment necessary in ship-loading/unloading are within its coverage. Those decisions are based on the premise that such maintenance or repairs are either "an integral part of,"⁵ "vital to,"⁶ "essential to,"⁷ or "essential and indispensable"⁸ to the progressively mechanized process of ship-loading/unloading occasioned by modern technology.

In similar fashion, the federal circuits have addressed the related question of LHWCA coverage of different types of work done in shipbuilding and repair yards, finding coverage when a particular job was either "essential to . . . and was a necessary link in,"⁹ "necessary to,"¹⁰ or "significantly related to and

⁵ *Prolerized New England Co. v. Miller*, 691 F.2d 45, 47 (1st Cir. 1982); *Sea-Land Services, Inc. v. Director, Office of Workers' Compensation Programs*, 685 F.2d 1121, 1123 (9th Cir. 1982).

⁶ *Harmon v. Baltimore & O. R.R.*, 741 F.2d 1398, 1404 (D.C. Cir. 1984); *Garvey Grain Co. v. Director, Office of Workers' Compensation Programs*, 639 F.2d 366, 370 (7th Cir. 1981).

⁷ *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059, 1061 (4th Cir. 1980).

⁸ *Hullingshorst Industries, Inc. v. Carroll*, 650 F.2d 750, 755-56 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982).

⁹ *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 343 (1st Cir. 1981).

¹⁰ *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977).

directly furthered"¹¹ the employer's shipbuilding and ship repair functions.

Amici curiae submit that the approaches taken by those federal decisions, and not the Virginia approach, correctly resolve the inquiry into the scope of coverage of the LHWCA, as amended. Their holdings generally comport with *Northeast Marine Terminal's* finding of coverage for a cargo checker whose work, although not involving actual handling of cargo, was nevertheless "an integral part of the unloading process as altered by the advent of containerization,"¹² whereas Virginia's approach (which turns on whether the employee was "actually engaged in the handling of cargo") does not. Moreover, their holdings are generally in accord with the "collective non-performance" standard utilized by this Court to determine similar coverage questions under the 1939 Amendments to the FELA, which has proved successful because it is a simple, direct, objective and common-sense test which achieves uniformity in application over a broad spectrum of jobs.

A. LHWCA COVERAGE WAS EXPANDED FOR REASONS SIMILAR TO THOSE WHICH PROMPTED EXPANSION OF FELA COVERAGE

As cogently discussed in *Northeast Marine Terminal*, LHWCA coverage initially was limited to "navigable waters", leaving those injured landward of the so-called "Jensen line" to state compensation remedies. Thus, LHWCA coverage sometimes depended

¹¹ *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 1088 (11th Cir., 1988).

¹² 432 U.S. at 271.

upon fortuitous and hypertechnical circumstances, such as whether the worker's body had been hurled into the water or remained on land,¹³ or the location and status of the cargo at the time of injury (the so-called "point of rest" theory).¹⁴ Congress enacted the 1972 Amendments to the LHWCA to meet the changes occasioned by modern technology, as well as to provide equal treatment to all workers engaged in the same job of ship-loading/unloading by moving the "Jensen line" landward.¹⁵ By looking also to the duties of the employee, Congress obliterated the "point of rest" theory.¹⁶ The 1972 Amendments based LHWCA coverage upon a dual "situs-status" test—by expanding the definition of "navigable waters" in 33 U.S.C. § 903 (a) to include adjoining piers, wharfs, terminals or other adjoining areas customarily used in ship-loading/unloading, and by broadening the definition of "employee" in 33 U.S.C. § 902 (3) to include anyone engaged in maritime employment, including longshoremen and harbor workers, subject to certain narrow express exceptions.¹⁷

Some thirty-two years previously, the Congress had expanded the FELA's coverage based upon much the same considerations. Prior to the 1939 Amendment to 45 U.S.C. § 51, the FELA provided that a "railroad, while engaged in commerce" between the states, "shall be liable in damages to any person suffering

¹³ *Northeast Marine Terminal*, 432 U.S. at 259.

¹⁴ *Id.* at 274-75.

¹⁵ *Id.* at 263.

¹⁶ *Id.* at 277-79.

¹⁷ *Id.* at 263-66.

injury while he is employed by such carrier in such commerce.”¹⁸ Litigation developed hypertechnicalities, such as the “moment of injury” and “new construction” doctrines, which resulted in some workers being allowed to proceed under the FELA, while others doing like work were left with state remedies. The 1939 Amendment to the FELA expanded its coverage to embrace those whose duties included the “furtherance of interstate or foreign commerce,” or whose duties “in any way directly or closely and substantially affect such commerce.”¹⁹ In companion decisions, this Court found the purpose of the 1939 Amendment was “to obliterate fine distinctions as to coverage between employees who, for the purpose of this remedial legislation, should be treated alike,”²⁰ and to “cure the evils of hypertechnical distinctions which had developed in over 30 years of FELA litigation.”²¹

Unquestionably, the 1939 Amendment to the FELA evinced a congressional purpose “to expand [that Act’s] coverage substantially.” *Reed v. Pennsylvania R. Co.*, 351 U.S. at 506. A similar “expanded view of coverage” to be afforded under the 1972 Amendments to the LHWCA was recognized in *Northeast Marine Terminal*, 432 U.S. at 268. In essence, the underlying reason for amending both statutes was to negate the hypertechnicalities which produced different results for employees doing similar work. To ac-

¹⁸ 45 U.S.C. § 51 (originally enacted as Act of April 22, 1908, ch. 149, § 1, 35 Stat. 65).

¹⁹ 45 U.S.C. § 51 (as amended by Act of August 11, 1939, ch. 685, § 1, 53 Stat. 104).

²⁰ *Reed v. Pennsylvania R. Co.*, 351 U.S. 502, 505 (1956).

²¹ *Southern Pacific Co. v. Gileo*, 351 U.S. 493, 499 (1956).

comply with this, the amendments to both statutes focused upon the employee's *duties* in relation to the statutory criteria: whether the duties further or closely and directly affect interstate commerce under the FELA;²² and whether they constitute "maritime employment" as a longshoreman or harbor worker so as to satisfy the "status" requirement under the LHWCA.²³

As will be discussed below, the collective non-performance standard utilized by this Court in determining coverage questions under the 1939 Amendment to the FELA is remarkably similar to that utilized in the federal decisions in making the analogous determination under the LHWCA.

B. THE COLLECTIVE NON-PERFORMANCE STANDARD USED IN DETERMINING FELA COVERAGE IS READILY ADAPTABLE TO THE LHWCA

Because the determination of the question of "status" under the LHWCA requires an analysis of job duties as they relate to the statutory criteria of "maritime employment," the analysis utilized by this Court in making the analogous determination of coverage questions under the FELA's statutory criteria is readily adaptable thereto.

The standard by which specific coverage questions were resolved under the 1939 Amendments to the FELA was developed in the companion cases of *Gileo* and *Reed*. In *Gileo*, the Court approached the question by utilizing a collective non-performance analysis. The

²² *Id.* at 499.

²³ *Northeast Marine Terminal*, 432 U.S. at 264.

Court analyzed the issue as to whether "[f]ailure to perform their duties would preclude delivery to the railroad of cars . . . essential to its transportation needs" or "substantially impede the carrier's performance" in the case of one of the workers.²⁴ With respect to another worker, the Court reasoned that "since wheels which wear out cannot be repaired, they must be recast The operation itself is a vital link in the chain" ²⁵ Similarly, in *Reed*, the Court analyzed the necessity of the work in question, not focusing on the individual employee, but instead assessing the effects of non-performance by all employees engaged in the same work: "[i]f all employees who perform petitioner's duties were removed from service, respondent could not conduct its operations without a change in its organizational system."²⁶

While this Court has not promulgated a specific standard by which to determine "status" under the 1972 Amendments to the LHWCA, it has nevertheless indicated the basis for such a standard when it found coverage for one performing "an integral part" of the ship-loading/unloading process,²⁷ as well as another finding of coverage for a worker "responsible for some portion of that activity."²⁸ Those findings,

²⁴ *Southern Pacific Co. v. Gileo*, 351 U.S. at 499.

²⁵ *Id.* at 500.

²⁶ 351 U.S. at 506-07.

²⁷ *Northeast Marine Terminal*, 432 U.S. at 271. The word "integral" is defined as "necessary for completeness; essential . . ." or "whole or complete" or "made up of parts forming a whole." Webster's New World Dictionary, 732 (2d College ed. 1986).

²⁸ "A worker responsible for some portion of that [longshoring]

coupled with this Court's recognition therein that Congress intended a "simple, uniform standard of coverage" commend the simple, direct and common-sense approach used in adjudicating FELA coverage questions.

For example, in the cases at bar, the work of clearing spilled coal by respondents Schwalb and McGlone, if not done, would soon result in an interruption to the loading process. Similarly, the retarder repairs being done by respondent Goode, if not performed, would result in an interruption to the loading process, as the coal cars must be properly stopped and positioned prior to their being lifted and rotated so as to drop the coal through the hopper and onto the conveyor belts. By application of the collective non-performance standard, the vital nature of their duties to the loading process becomes readily apparent.

Thus, *amici curiae* submit that the FELA's collective non-performance standard is readily adaptable to determine "status" questions under the LHWCA. The test is simple in application: whether non-performance of the duties of the employee and others doing the same work would result in the ship-loading/unloading process being impeded, stopped, or rendered less safe or efficient. If so, such work *a fortiori* would constitute a "vital link in the chain" or an "integral" and "indispensable" part of "longshoring" or "harborworking," and thus satisfy the "status" requirement adopted in the 1972 Amendments to the LHWCA.

activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." *P. C. Pfeiffer Co. v. Ford*, 444 U.S. at 82-83.

II. THE SUGGESTED STANDARD WOULD RESOLVE THE INTOLERABLE CONFLICT CREATED BELOW AND WOULD ACCOMMODATE CHANGES OCCASIONED BY ONGOING TECHNOLOGICAL ADVANCES

The decision below, by failing to accord Longshore status to employees whose work is necessary to the continued functioning of ship-loading equipment, is in direct conflict with the decisions of six federal circuits which have considered the question.²⁹ Whether viewed in the context of defeating the congressional intent for LHWCA uniformity recognized in *Pfeiffer*, or in the broader context of violating the principles underlying federal supremacy,³⁰ the conflict is intolerable under federal law.

The wisdom of the doctrines of uniformity and federal supremacy is clearly demonstrated where, as here, a state court deliberately chooses to put itself in conflict with its federal circuit court. Indeed, in refusing to apply the holding in *Price v. Norfolk & Western Ry. Co.*, the Virginia court candidly stated:

The *Price* court reasoned that, because "the failure to paint would eventually lead to severe rusting that would halt the entire [loading] process" [citation omitted] the plaintiff was engaged in maritime employment and, consequently, "was an 'employee' within the meaning of the LHWCA which provides an exclusive remedy." [citation omitted.]

²⁹ See fns. 5-8, *supra*.

³⁰ The Supremacy Clause "imposes upon state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' [Citation omitted.]" *Felder v. Casey*, 486 U.S. —, 108 S.Ct. 2302, 2313 (1988).

We cannot agree that Congress intended the 1972 amendments to have such pervasive and preclusive effects.

365 S.E.2d at 744 (emphasis added). As a result, an injured employee will have different rights and remedies, depending solely upon whether his case is filed in a federal or a state court in Virginia—the very evil sought to be avoided under the LHWCA's concept of uniformity, and under the concept of federal supremacy. *Felder v. Casey*, 108 S.Ct. at 2313.

Not only is Virginia's view in direct conflict with the Fourth Circuit,³¹ it stands alone in stark contrast with this Court's observation in *Northeast Marine Terminal* that the "language of the 1972 Amendments is broad and suggests . . . an expanded view of its coverage,"³² occasioned by "the advent of modern cargo-handling techniques."³³ Moreover, the Virginia view is belied by the 1984 LHWCA Amendments,³⁴ as to which Congress made clear that

³¹ Virginia's view is premised upon an obvious misapplication of this Court's decision in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985) and the Ninth Circuit's decision in *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976). In those cases, the workers were injured in areas not covered by the LHWCA, and the duties of each had no relation whatever to the ship-loading process. Moreover, the Virginia court totally ignored a post-*Weyerhaeuser* Ninth Circuit decision holding coverage for a worker whose duties involved repairing container cargo equipment. *Sea-Land Services, Inc. v. Director, Etc.*, 685 F.2d 1121.

³² 432 U.S. at 268.

³³ *Id.* at 269.

³⁴ Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 2 (a), 98 Stat. 1639 (codified as amended at 33 U.S.C. § 902 (3)).

even non-cargo handling clerical workers were covered when some of their duties involve working in areas in which cargo is handled.³⁵

We believe, however, that the collective non-performance standard discussed in Section I, *supra*, if adopted, would eliminate conflicts of the type involved here, by providing a simple, objective, practical and uniform test by which to determine questions of LHWCA "status" occasioned by on-going developments in technology.³⁶ The very simplicity of the standard allows the highest degree of flexibility in application, whether in resolving present questions (such as those occasioned by differences in union

³⁵ "Workers . . . may be deemed to be engaged . . . in 'clerical type work', but [when] that work is done in the areas in which cargo is handled, not exclusively in a business office . . . the checker or clerk would remain within Longshore Act jurisdiction." H.R. Rep. No. 570, 98th Cong., 1st Sess. (1983), reprinted in 1984 U.S. Code Cong. & Ad. News 2734, 2737.

³⁶ In the federal decisions, the First and Fourth Circuits have resolved the "status" question by the express utilization of a non-performance analysis. See *Graziano v. General Dynamics Corp.*, 663 F.2d at 343; *Price v. Norfolk & Western Ry. Co.*, 618 F.2d at 1062. Although not utilized *eo nomine*, a non-performance concept is subsumed in the Seventh and D. C. Circuit analyses that the work was "vital" (*Harmon v. Baltimore & O. R.R.*, 741 F.2d at 1404; *Garvey Grain Company v. Director, Etc.*, 639 F.2d at 370), as well as in the Fifth Circuit's analysis that the work was "essential and indispensable" (*Hullingshorst Industries, Inc. v. Carroll*, 650 F.2d at 756). By contrast, the decisions of the Ninth and Eleventh Circuits involve a different approach, whereby they assess the nature of the maritime work of the employer, and consider whether the employee's duties are "integral" thereto, or "directly further" the same. See *Sea-Land Services, Inc. v. Director, Etc.*, 685 F.2d at 1124; *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d at 1088.

agreements, job descriptions, work rules, or methodology used in connection with the ship-loading/unloading process, which may differ from port-to-port, or from employer-to-employer or pier-to-pier in the same port), or in resolving future questions occasioned by technological advances which are presently unknown.

The startling gains in productivity achieved by technology were referred to in *Northeast Marine Terminal*.³⁷ Of course, economies of time and effort are not possible without the heavy-capacity machinery of different types required for the infinite varieties of cargo transported over the waters. While such machinery may replace a number of workers doing manual loading, yet other types of workers are needed to perform the preventive maintenance necessary for its continued and efficient operation, as well as the repairs necessary to restore it to service following a malfunction. Absent their work, modern ship-loading would halt.

Whatever the particular technology which may be involved (e.g., that utilized in containerization of traditional cargo, rapid open or closed loading of bulk commodities, or safe loading of combustible fuels and gasses), the same principle applies—the speed, efficiency, and safety for which the technology was developed is defeated if the equipment is not maintained in a continuing state of good repair. Although the details of future technology are, of course, unpre-

³⁷ The Court cited a study which showed that 42 men working a total of 546 man-hours could accomplish with containerization the same work done by 126 men working a total of 10,584 man-hours utilizing conventional methods. 432 U.S. at 270 n.31.

dictable, there is nothing which suggests there will be any change in the principle underlying the requirement that equipment be kept in a continuing state of good maintenance and repair. Whatever particular facts exist, or in the future may exist with respect to a given job and its relationship to the technology utilized in the shiploading process, the collective non-performance standard will provide a simple test by which to achieve uniformity in determinations as to whether various types of workers satisfy the LHWCA's "status" requirement.

Moreover, the 1984 LHWCA Amendments ensure that the collective non-performance standard would not be applied beyond the limits intended by Congress. First, those amendments did nothing to lessen the requirement that "situs" be satisfied. Second, as regards "status", the Congress further defined the term "employee" so as *not to include* certain individuals, such as those "employed exclusively to perform office clerical, secretarial, security, or data processing work,"³⁸ thus establishing the outer limits of "status."³⁹ Even as to these outer limits the legislative history is clear that the Congress intended them to be literally construed:

³⁸ Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 2(a), 98 Stat. 1639 (codified as amended at 33 U.S.C. § 902 (3)).

³⁹ This provision, for example, would preclude LHWCA "status" for an office clerical worker such as the tracing file clerk involved in *Reed v. Pennsylvania R. Co.*, 351 U.S. 502, unless that job required the employee to perform a part of the work (e.g., delivery of the requested tracings to the loading superintendent) in the area where cargo is handled, in which case the worker would qualify for LHWCA "status."

The Committee intends that this exclusion be read very narrowly. First, the Committee intends that the word "exclusively" modify all four classifications of work presented. . . . The Committee firmly believes that the situation in which a worker may be covered at one time, and not covered at another, depending on the nature of the work which the worker is performing at the time of injury must be avoided since such a result would be enormously destabilizing, and would thus defeat one of the essential purposes of these amendments.

Second, the Committee intends that the word "office" modify the word "clerical". Not all clerical work is intended to be excluded—merely that which is performed exclusively in a business office of the employing enterprise. Workers who may be classified as clerks or cargo checkers for example may be deemed to be engaged, at times, in "clerical" type work, but that work is done in the areas in which cargo is handled, not exclusively in a business office of the stevedore. In such circumstances, the checker or clerk would remain within Longshore Act jurisdiction.

H.R. Rep. No. 570, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2734, 2736-37. Hence, with a clear declaration as to the outer limits of LHWCA coverage by the Congress, there is no danger that a collective non-performance standard to determine "status" would reach too far. Moreover, adoption of this standard would achieve that which this Court recognized was intended by the Congress in enacting the 1972 Amendments to the LHWCA: a "simple, uniform standard of coverage."

CONCLUSION

On the basis of the foregoing, *amici curiae* Association of American Railroads and National Association of Railroad Trial Counsel respectfully submit that the judgments of the Supreme Court of Virginia should be reversed, with directions to dismiss the complaints.

Respectfully submitted,

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